85-1449

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ETC., ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented For Review

1. Are covenants not to sue police officers or public officials for alleged deprivation of civil or constitutional rights, offered in return for a prosecutor's agreement to drop pending criminal charges, valid and enforceable if given voluntarily and deliberately by an informed criminal defendant?

2. Does the mere possibility of prosecutorial abuse require a *per se* prohibition of all release-dismissal agreements on federal public policy grounds, regardless of the facts or circumstances of the case?

List of All Parties

TOWN OF NEWTON (NEW HAMPSHIRE),
a municipal corporation;

DAVID T. BARRETT,
individually and as Chief of Police
for the Town of Newton;

KENNETH L. BOWERS, WILLIAM J. COOK
and MARY ALLEN, individually and in their official
capacities as Selectmen for the Town of Newton;
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

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Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 778 F.2d 66 and appears in Appendix A. The opinion of the United States District Court for the District of New Hampshire, not officially reported, appears in Appendix B.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was entered on December 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Relevant constitutional and statutory provisions are set forth in Appendix D: the First and Fourteenth Amendments to the Constitution of the United States; 42 U.S.C. § 1983; and New Hampshire RSA 641:5.

Statement of the Case

Background

At issue is the validity of a criminal defendant's pre-conviction waiver of the right created by 42 U.S.C. § 1983 to sue public officials for alleged deprivation of federal civil and constitutional rights.

The criminal defendant, civil plaintiff and respondent in this case, Bernard E. Rumery, Jr., was arrested on May 12, 1983, for tampering with a witness, in violation of New Hampshire RSA 641:5, I(b), a Class B felony (D-2). Respondent, a married, middle-aged insurance company marketing representative, had no prior arrest or criminal record. His arrest for witness tampering resulted from telephone conversations he had with the victim in a pending case of alleged aggravated felonious sexual assault. Respondent and the alleged rapist were hunting companions. Both knew the victim. Respondent's arrest came after statements by the victim to the police to the effect that respondent gave her an ultimatum: either drop the rape charges or suffer physical and emotional harm.[1] (A-2, 3, B-1, 3)

[1] Respondent insisted he did not threaten the victim. At the hearing before the United States District Court, petitioners introduced the police report containing the victim's statement that respondent told her she [and her daughter] "might end up like two [recently murdered] women in . . . Massachusetts" if she persisted with the rape case. (B-1, 2) Because the District Court enforced the covenant not to sue, it did not determine whether respondent actually threatened the victim. The District Court did find respondent informed the victim "if she did not want to hurt Champy [her alleged attacker] she could call the county attorney and ask him to drop the charges. According to [respondent] the conversation was innocuous. . . ." (B-3)

Respondent was arrested at his home pursuant to a warrant issued by a municipal district court. He was advised of his rights, handcuffed and transported to jail for booking. Following his release on personal recognizance, respondent retained an experienced criminal attorney, who contacted the deputy county attorney assigned to prosecute both the rape and witness tampering cases. (A-3, B-3) They discussed "whether the State would be willing to drop the prosecution of . . . the witness tampering charge in exchange for the [respondent's] signing a release indicating he would not sue the parties involved. . . ."[2] (B-2)

The covenant not to sue (Appendix E) was drafted by respondent's defense attorney, who presented the document at his office to his client, on or about June 3, 1983, less than a month following the arrest. A probable cause hearing had been scheduled for June 14, 1983. The case has not been presented for grand jury indictment. Respondent's defense attorney discussed the covenant with him for an hour or so, advising him that, if he executed the covenant, he would be waiving all claims arising from his arrest for witness tampering. The covenant not to sue named the victim (complainant) in addition to the Town and its police department. (See Appendix E.)

After considering the matter for three days, respondent executed the covenant not to sue, on June 6, 1983. The District Court found the prosecutor had exerted no pressure on respondent to sign the covenant. (B-2) Subsequently, as agreed, the

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[2] The prosecutor testified he had been advised that the victim did not want to testify against respondent. He was particularly concerned because she was the principal witness in the ongoing rape case. The alleged rapist had already been indicted. The prosecutor testified he considered the possible trauma to the victim if she were forced to testify. When the covenant not to sue was being discussed, the prosecutor "didn't know if they would have forced [the victim] to testify" against respondent on the witness tampering charge. Neither he nor respondent's defense attorney could recall specifically who first suggested the possibility of a covenant not to sue, in return for which the charges against respondent would be dropped. (B-2)

prosecutor entered a *nolle prosequi* on the witness tampering charge. The scheduled probable cause hearing was not held.

Jurisdiction Below

Ten months later, in April 1984, reneging on his agreement, respondent filed a six-count civil rights action, raising claims under 42 U.S.C. § 1983, as well as pendent state law claims. Petitioners pleaded the covenant not to sue as an affirmative defense.[3]

The District Court looked at the circumstances, found no indication of prosecutorial coercion or vindictiveness and dismissed the complaint, specifically finding:

> [Respondent] is a knowledgeable, industrious individual with vast experience in the business world. Further, he intelligently and carefully, after weighing all the factors, concluded, that it would be in his best interest and welfare to sign the covenant. He was also represented by a very competent attorney. . . . (B-4) (See also A-3, 4, where the Court of Appeals noted this finding.)

On appeal, the Court of Appeals (Circuit Judges Coffin, Breyer and Timbers[4]) summarized the facts found by the trial court and found no reason to question these findings. Nonetheless, the Court of Appeals categorically held as a matter of federal law:

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[3] The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343(3). The original complaint alleged deprivation of rights secured by the Fourteenth Amendment, arising from respondent's arrest, and negligence, defamation, false imprisonment, negligent infliction of emotional distress and state constitutional violations. After petitioners raised the covenant as a bar, respondent moved to amend the original complaint to add a count alleging deprivation of rights secured by the Fourteenth Amendment by alleged "extraction" of the covenant not to sue.

[4] Of the Second Circuit, by designation.

> [A] covenant not to sue public officials for alleged deprivations of constitutional rights, executed in exchange for a decision not to prosecute criminal charges, is void *ab initio* as against public policy. (A-2)

The Court of Appeals held "such releases have the effect of injuring the public interest." (A-6) The Court in effect held that a criminal defendant cannot, as a matter of law, make an uncoerced choice "between filing a civil rights claim and being prosecuted on a criminal charge." (A-7)

Argument

I. This Court Should Grant Certiorari Because the Court of Appeals for the First Circuit Has Adopted a *Per Se* Rule of Federal Public Policy Prohibiting all Release-Dismissal Agreements, Further Polarizing an Existing Conflict in the Circuits.

In its decision, the Court of Appeals recognized "that [its] sister federal courts of appeals have reached varying results" in deciding whether agreements by criminal defendants releasing civil rights claims are enforceable. (A-4)

In the most recent of these cases, *Bushnell* v. *Rossetti*, 750 F.2d 298 (4th Cir. 1984), the Court of Appeals for the Fourth Circuit analyzed the circumstances surrounding the release and enforced it. The *Bushnell* Court used the standard announced in *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), which held that a release of claims under 42 U.S.C. § 1983 may be valid if it results from a decision which is "voluntary, deliberate, and informed." *Id.* at 1203.[5] The District Court

[5] The plaintiff in *Jones* was being held in jail after conviction, while awaiting sentencing. Allegedly, he was taken from his cell, abused and beaten and then placed in a special segregation cell for 19 days. Subsequently, he was escorted to an interview room and offered $500 to release all claims arising from his mistreatment. The Court held the release could be enforced if it were voluntary, deliberate and informed. Remanding for trial on this issue, the Court noted objective factors which might dissipate a coercive

here applied the standard adopted in *Jones* and *Bushnell*, but the Court of Appeals rejected it in favor of a *per se* rule of federal public policy which flatly prohibits prosecutors from offering or accepting release-dismissal agreements, under any circumstances. (A-8, 9)

In contrast, the Court in *Bushnell* rejected the plaintiff's "broad contention that any release of civil rights claims in exchange for criminal sentencing considerations is *per se* void and unenforceable." *Bushnell*, *supra*, 750 F.2d at 301. The Court there found no evidence of prosecutorial abuse on the facts.[6] In enforcing the agreement, the Court found that Bushnell, as an attorney himself, was fully aware of the legal consequences of the release agreement, and he consulted privately with his own criminal defense attorney before executing it. Under those circumstances, the Court said, the release was voluntary, deliberate and informed, and hence, enforceable.

The *Bushnell* Court said it would "leave to a future date consideration of the validity of release agreements in exchange for dismissal of criminal charges, negotiated in facially non-coercive circumstances." *Id.* at 301 n.*. The Court of Appeals for the First Circuit has now had that opportunity, and its decision, adopting a *per se* rule, conflicts with the case-by-case approach followed in *Bushnell*.[7]

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atmosphere, "such as the presence of an attorney representing the releasing party or the opportunity for [him] to consider the consequences of his actions in a neutral environment." *Jones*, *supra*, 648 F.2d at 1205.

[6] The plaintiff, while trying to report a crime he had just witnessed, became agitated and was himself arrested for disorderly conduct and resisting arrest. He then filed a federal civil rights claim under 42 U.S.C. § 1981, *et seq*. Subsequently, he was tried and convicted on the criminal charges. Counsel for the defendants in the federal civil rights action approached him, proposing an agreement whereby he would agree to dismissal of the civil rights suit with prejudice if in exchange the prosecutor could be persuaded to recommend probation before judgment. The prosecutor made the recommendation, which was granted by the court, and the plaintiff, an attorney, was thus spared a criminal record. However, in the months following, he refused to sign a proposed dismissal order in the civil action, as agreed.

[7] The Court of Appeals for the Fourth Circuit cited *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 170 Cal. Rptr. 42, 620 P.2d 628 (1980), in which

In the opinion below, the Court of Appeals here indicated that public policy considerations which the *Bushnell* Court found inapplicable in the post-conviction setting "may be invoked appropriately in the instant case" involving dismissal of criminal charges. (A-5, 6) Petitioners submit that the distinction drawn by the Court below does not, however, reconcile the conflict between its approach and that adopted in *Bushnell* and *Jones*, *supra*.

In *Bushnell*, the Court observed that the plaintiff's conviction had "removed the possibility that the charges. . . were fabricated in order to coerce him into releasing his civil claim against the city and its agents." *Bushnell*, *supra*, 750 F.2d at 302. But, in this case, the *per se* rule adopted by the Court below precludes any opportunity to show from other evidence, in the pre-conviction context, that the criminal charges were not fabricated with coercive intent.

The *Bushnell* Court further observed that the danger of "forestalling exposure of possibly unconstitutional or illegal government practices" was not present in the post-conviction setting. *Id.* at 301. But the approach taken by the Court of Appeals below, because it precludes looking at the circumstances of the pre-conviction case, is tantamount to a conclusive presumption of official misconduct. The Court's approach necessarily places the abstract public interest in exposing the few instances of official misconduct above the individual's specific right in every case to evaluate alternatives and make a voluntary, deliberate, informed and self-interested decision. The effect of the Court's holding is to prohibit the criminal defendant from seeking an agreement and the prosecutor from ever accepting it.

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the Supreme Court of California, adopting a flexible approach, concluded that "the time honored practice of discharging misdemeanants on condition of release of civil liabilities or stipulation of probable cause for arrest, does not contravene public policy *when the prosecutor acts in the interests of justice.*" 28 Cal.3d at 613-14, 170 Cal. Rptr. at 49, 620 P.2d at 635 (emphasis added).

The approach taken by the Court below cannot be harmonized with the spirit of the *Bushnell* case, which recognized the considerable benefit to the plaintiff from the agreed exchange. Nor can the approach below be reconciled with the specific holding of the Court of Appeals for the Ninth Circuit in the *Jones* case, *supra*, in which even the manifest mistreatment of the plaintiff did not cause the Court to foreclose the possibility of a voluntary, deliberate and informed act or to hold the release void *ab initio* as against federal public policy.

The potential for prosecutorial abuse envisioned in the opinion below was actually presented on the facts in the key cases with which the Court of Appeals here aligned itself: *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), and *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970). Chief Judge Bazelon, writing for the Court in *Dixon*, and Judge Duniway, in *MacDonald*, condemned release-dismissal agreements on both federal public policy and constitutional grounds. Their strictures on prosecutorial discretion were subsequently applied by the Court of Appeals for the Seventh Circuit in *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975) (a case involving alleged police brutality).

In *Dixon*, the Court of Appeals deplored the prosecutor's action, stating:

> The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances. *Dixon*, *supra*, 394 F.2d at 968.[8]

The *Dixon* Court saw potential equal protection, as well as First Amendment, violations inherent in a situation in which

[8] *Dixon* involved a black motorist, who was stopped by two white police officers for alleged traffic violations. He was neither charged nor ticketed at the time. After making a written complaint about the officers' conduct, he entered into a tacit agreement: he would not proceed with his complaint and the government would not prosecute the traffic charges. Later, he made a formal complaint, and the prosecutor responded by filing charges.

those who complain about police misconduct are punished and those who do not are excused. To remove the danger of trumped-up charges, the Court held it was necessary to "bar prosecutions which are brought because the defendant refused to promise or reneged on a promise not to file a complaint against the police." *Id.* at 969.

In *MacDonald, supra*, the Court of Appeals for the Ninth Circuit concluded that a lesser charge on which conviction was likely had been added as "the bludgeon" behind an attempt "to hamper MacDonald in asserting, by civil action, both state and federal civil rights."[9] The Court deemed this practice offensive to the First and Fourteenth Amendments. *MacDonald, supra*, 425 F.2d at 377.

In the instant case, there is not even a hint of misconduct by the prosecutor. Nothing in the record below indicates he was attempting to cover up police misconduct. There were no concocted charges added by the prosecutor, and the District Court found he exerted no pressure to have respondent sign the covenant. In addition, the prosecutor testified he believed there was probable cause for the arrest, assuming the victim was telling the truth. However, in the absence of corroborating evidence, respondent's conviction depended upon the victim's credibility as a witness, and she had expressed her reluctance to testify. Moreover, she was also the key witness in the pending rape case, in which an indictment had been returned, and the prosecutor was concerned about her emotional vulnerability. (B-1, 2) The Court of Appeals below took none of these circumstances into account, nor did it consider the benefit respondent derived from the agreement.

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[9] A motorist was arrested for driving under the influence. On the day of trial, the prosecutor moved to dismiss the charge. When the accused refused to stipulate to probable cause, however, the prosecutor withdrew the motion and amended the charge to include resisting arrest, a charge on which there was a greater chance of conviction, and on which the accused was, in fact, convicted.

Instead, the Court's overriding concern for *potential* prosecutorial abuse led it to adopt a *per se* rule which appears to brook no exceptions. The Courts in *Dixon*, *MacDonald* and *Boyd*, *supra*, were justifiably offended by what was perceived to be official misconduct under the circumstances in those cases.[10] Indeed, the Court of Appeals for the Fourth Circuit analyzed the circumstances in those cases and limited their holdings to a prohibition "against use of government's prosecutorial power either to exact releases of related civil rights claims or to retaliate for civil prosecution of such claims." *Bushnell*, *supra*, 750 F.2d at 301.

Taking the opposite approach, the Court of Appeals for the First Circuit here ignored the real factual differences between this case and *Dixon*, *MacDonald* and *Boyd*, *supra;* drew an artifical distinction between *Bushnell* and this case; and cited with approval the holding of *Horne* v. *Pane*, 514 F. Supp. 551, 552 (S.D. N.Y. 1981), "that a defendant forced to choose between filing a civil rights claim and being prosecuted on a criminal charge cannot make an uncoerced choice as a matter of law." (A-7)

The manifest conflict in the approaches taken in the various circuits prior to the instant case is so polarized that certiorari is warranted. The conflict is not just an apparent one which disappears upon closer examination, but rather, a fundamental difference in point of view: is a case-by-case analysis appropriate to determine the circumstances, including whether the criminal defendant has made a "voluntary, deliberate and informed" waiver, or are such release-dismissal agreements void *ab initio* on federal public policy or constitutional grounds?

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[10] In *Boyd*, the plaintiff's civil rights claim alleged that police officers stopped and searched the car in which she was riding. They also searched its three male occupants and found nothing incriminating. Plaintiff refused to be searched. The police officers then allegedly pushed her violently against the car, used abusive language, threatened her, arrested her, and took her to the police station where she was incarcerated for five hours and charged with disorderly conduct and resisting a police officer in the performance of his duties. Plaintiff allegedly was pregnant and later suffered a miscarriage as a result of the assault.

II. This Court Should Grant Certiorari Because the *Per Se* Rule Adopted by the Court of Appeals for the First Circuit too Narrowly Defines the Public Interest and Places an Unwarranted Constraint on Prosecutors, Raising an Important Question of Federal Law.

The Court of Appeals below observed "[s]ince the object of a criminal prosecution is to vindicate the public, not a private individual, an agreement not to prosecute should be upheld only where the *public* interest is served. "(A-6) (emphasis in original)"[11] In the First Circuit, release-dismissal agreements are viewed as inherently coercive and injurious to the public interest. This view is not uniformly held by federal judges, however, as *Bushnell* and the dissenting opinion in *MacDonald*, *supra*, demonstrate.

In his dissent in *MacDonald*, Judge Kilkenny termed the approach of the majority "wholly unrealistic" and expressed his "firm belief that those in charge of prosecution of criminal actions have a duty to protect, if probable cause exists, arresting officers from both state or federal civil actions." 425 F.2d at 377. He went on to conclude that the majority had "erroneously raised a simple procedural act of the prosecutor to the dignity of constitutional dimensions." *Id.* at 378.

This view was also expressed in *Hoines* v. *Barney's Club, Inc.*, *supra*, n.7. There the California Supreme Court examined release-dismissal agreements in light of policy considerations bearing on plea bargaining transactions and concluded:

> Because a release-dismissal transaction normally concerns itself with lesser acts of criminal conduct, the state may

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[11] In a private release agreement case decided the same day, the Court referred to the instant case in these terms: "Although consideration existed to support the contract in *Rumery*, we still found the contract invalid . . . because it did not serve the public interest. . . . Because the criminal laws seek to vindicate the public interest, agreements must . . . serve the interests of the public, not just those of the prosecutor." *Premier Electric International Corp.* v. *Solar Devices, Inc.*, 778 F.2d 71, 74-75 (1st Cir. 1985).

> reasonably elect to forego the imposition of any criminal proceedings or sanctions. However, in so doing it must protect those who—because the charges are to be dismissed—might be improperly exposed to claims of civil liabilities. . . . In requiring a release from the accused—*but only by his free and voluntary election*—the state accomplishes both the imposition of the bargained-for disability and protection of those it reasonably deems to be innocently involved. 28 Cal.3d at 612-13, 170 Cal.Rptr. at 48, 620 P.2d at 634 (emphasis added).

Cf. Corbitt v. *New Jersey*, 439 U.S. 212, 218-19 & n.8 (1978) ("not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid"); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978) (prosecutor's conduct, which merely presented defendant with alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate Due Process Clause of Fourteenth Amendment); and *Brady* v. *United States*, 397 U.S. 742, 748 (1970) (guilty plea acceptable if voluntary, knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences).

The California Supreme Court in *Hoines*, *supra*, took a more expansive view of the public interest than did the Court of Appeals in this case. The majority view in *Hoines* is well explained by this excerpt from the opinion of a lower court justice:

> "Municipal court judges for many years have been accustomed to dismissing minor misdemeanor cases on motion of the district attorney upon assurance that law enforcement officers, public agencies or private parties will not be subjected to civil litigation by the criminal defendant. This occurs not infrequently in shoplifting cases, disturbances involving husbands and wives, and a myriad of other disturbance situations. Often, the arrest and tem-

> porary detention of a person . . . is sufficient to defuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable. Further prosecution in many cases would cause embarrassment in employment, unnecessary matrimonial hostility or . . . a possible thwarting of a future career. The reasons are multitudinous for the district attorney not to want to pursue the prosecution of a person arrested with probable cause for a minor public offense, in the best interest not only of society but of the individual involved. At the same time, it is reasonable to seek to protect the arresting officer or the complaining individual from the burden of civil litigation arising out of the incident. [¶] If this tool is taken away from the district attorney, . . . there will be a likelihood that many cases which otherwise would have been dismissed will be prosecuted, to the detriment of society as well as the victim and the defendant." 28 Cal.3d at 610 n.7, 170 Cal. Rptr. at 47 n.7, 620 P.2d at 633, n.7.

This explication of how release-dismissal agreements may serve, not injure, the public interest could have been written with the facts of the instant case in mind. Witness tampering, the offense with which respondent was charged, is a "disturbance situation," which arrest can stop. Respondent in this case was not likely to speak to the victim again about the pending rape case, and further prosecution would have caused him personal and professional embarrassment.

In addition, not only would further prosecution have resulted in a possible criminal conviction for respondent as well as expense to the state, but it would have subjected an overwrought victim to the ordeal of testimony in both the witness tampering and rape cases. In such a situation, it was a reasonable prosecutorial decision to forgo forcing the reluctant victim to testify in the witness tampering case, in order to conserve her testimony in the rape case. This decision, in fact, served the very object of the witness tampering statute, which is to protect witnesses.

Under the circumstances it was reasonable and consistent with the public interest for the prosecutor to accept the covenant not to sue. Respondent's criminal defense attorney had threatened civil litigation and was demanding immediate dismissal of charges, prior to a probable cause hearing or grand jury indictment hearing. At the same time, respondent's attorney was also pursuing the possibility of a covenant not to sue. In such a situation, so long as respondent willingly and knowingly executed the covenant, it was in the public interest to spare the victim (complainant) and local police and municipal officials the burden of potential civil litigation.[12]

Indeed, the California Supreme Court went even further in the *Hoines* case, *supra*, by holding that the prosecutor may in appropriate circumstances condition dismissal on a release of civil liabilities or stipulation of probable cause for arrest. The Court there said, "Surely we cannot embrace a proper plea bargaining transaction while rejecting a proper release-dismissal transaction as against public policy." *Hoines*, *supra*, 28 Cal.3d at 613, 170 Cal. Rptr. at 49, 620 P. 2d at 635.

In the instant case, the Court of Appeals conceded:

> A release of a civil rights claim might arguably be given effect where the prosecution acts reasonably and has a fairly good case against the claimant. But in such a case, a good defense . . . will exist and the need for a release will not come into play. . . . We hold that an exception cannot easily be shown important enough to outweigh its administrative burdens. (A-8)

Petitioners disagree. The Court's conclusion, a release is not "needed" where there is a good defense, erroneously assumes that claims without merit will not be brought, or, if brought, can easily and inexpensively be defended. This view discounts

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[12] *Cf. Food Fair Stores, Inc.* v. *Joy*, 283 Md. 205, 389 A.2d 874, 882 (Md. App. 1978) (mere offer of prosecutor to enter a *nolle prosequi* conditioned upon release of the complainant from civil liability was proper).

the considerable expense of defending civil rights claims against public officials, including settlement of claims without merit at "cost of defense", and the growing cost and difficulty municipalities face in obtaining liability insurance coverage for these claims. This view does not take into account the increasing burden of civil rights claims on state and federal court dockets, nor the potential effect on criminal court dockets from the ruling that release-dismissal agreements are void *ab initio*. These, too, are matters of public concern, whose pressures could be alleviated by allowing prosecutors to exercise reasonable discretion and by permitting courts to enforce voluntary, deliberate and informed release-dismissal agreements. To do so would not close the door to civil relief on the criminal defendant who has suffered abuse by public officials. Releases extracted under circumstances abridging civil or constitutional rights would not withstand scrutiny. But, a *per se* rule of law is potentially harmful in this context and constitutes an unwarranted constraint on the criminal justice system.

This Court has previously examined constitutional and public policy arguments similar to those raised by this case in the plea bargaining context. Petitioners submit that the opinion of the Court of Appeals below, holding covenants not to sue executed in return for dismissal agreements to be void *ab initio*, presents issues with equally far-reaching and significant implications. The facts surrounding the instant case, which the Court of Appeals disregarded in its desire to eliminate even the possibility of prosecutorial abuse, present an excellent occasion for this Court to provide much needed guidance on this important question of federal law.

Conclusion

This is the appropriate time to resolve the conflicting positions taken by the Courts of Appeals. If the release is enforceable under the circumstances of this case, its intended effect will not be achieved if certiorari is denied. For all the foregoing reasons, petitioners say that the petition should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 85-1508

BERNARD E. RUMERY, JR.,

PLAINTIFF, APPELLANT,

v.

TOWN OF NEWTON, ETC., ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. MARTIN F. LOUGHLIN, *U.S. District Judge*]

Before

COFFIN, BREYER and TIMBERS, *
Circuit Judges.

Charles P. Bauer with whom *G. Wells Anderson* and *Hall, Morse, Gallagher & Anderson* were on brief for appellant.

James S. Yakovakis with whom *Brian T. McDonough, James S. Yakovakis Professional Association, Donald E. Gardner* and *Devine, Millimet, Stahl & Branch Professional Association* were on brief for appellees.

December 2, 1985

* Of the Second Circuit, by designation.

TIMBERS, *Circuit Judge:*

Bernard E. Rumery, Jr. ("appellant") appeals from a judgment entered April 30, 1985 in the District of New Hampshire, Martin F. Loughlin, *District Judge*, granting defendants' motion to dismiss appellant's § 1983 claim and various pendent state law claims. The district court dismissed the complaint based on appellant's prior execution of a covenant not to sue, negotiated in exchange for the state prosecutor's decision to *nolle prosequi* a criminal case against appellant on a witness tampering charge. On appeal, Rumery contends that the district court erred in holding that the release barred his complaint and asserts that the covenant should be held void as against public policy. We hold that a covenant not to sue public officials for alleged deprivations of constitutional rights, executed in exchange for a decision not to prosecute criminal charges, is void *ab initio* as against public policy. We reverse.

I.

We shall summarize only those facts believed necessary to an understanding of the issues raised on appeal.

Rumery, a resident of Danville, New Hampshire, is a middle-aged marketing representative for an insurance company. After reading in a local newspaper that a former hunting companion of Rumery, one David Champy, had been charged with aggravated felonious sexual assault, Rumery telephoned Mary Deary to inquire whether she knew anything about the incident. Rumery and Mary Deary were business and social acquaintances. Rumery learned that Mary Deary was the alleged victim and the state's principal witness in the criminal case against Champy.

On May 11, 1983 Rumery and Mary Deary had a second telephone conversation. Appellees (the Town of Newton, its Chief of Police, David T. Barrett, and its Selectmen) contend that Rumery informed Mary Deary that Champy's wife had left him and that, if Mary did not want to hurt Champy, she

could call the county attorney and ask him to drop the charges. Rumery asserts that the conversation was innocuous and that he made no threats to Mary Deary. Chief Barrett indicated to Deputy County Attorney Brian Graf that Rumery had made statements to Mary Deary to the effect that she might end up like two women in Lowell, Massachusetts, who had been murdered. On May 12, Chief Barrett arrested Rumery for tampering with a witness, in violation of New Hampshire Rev. Stat. Ann. § 641:5,I,(b), a Class B felony. Rumery was arrested at his home in the presence of his wife, was handcuffed, and was taken to the Rockingham County jail.

Following his release on his personal recognizance, Rumery retained Stephen Woods as counsel. Woods, an experienced criminal attorney, and Graf discussed the possibility that the prosecution of Rumery could be dropped if Rumery signed a covenant not to sue the persons connected with his arrest. Chief Barrett had advised Graf that Mary Deary did not wish to testify against Rumery. Graf expressed concern about the lack of corroborating evidence of the telephone conversations.

Woods drafted the covenant not to sue and discussed the matter with Rumery. Three days after consulting with Woods, and before a hearing on probable cause for the arrest, Rumery signed the covenant not to sue the public officials connected with his arrest. Thereafter, the witness tampering charge against Rumery was dropped.

In April 1984, Rumery filed in the district court a six-count complaint pursuant to 42 U.S.C. § 1983 (1982) alleging both federal and pendent state law claims arising from his arrest for witness tampering. [1] Defendants Town of Newton, Chief Barrett and the Selectmen pleaded the covenant not to sue as an affirmative defense. In response to defendants' motion to dismiss and/or petition for declaratory judgment, the district court dismissed the complaint, finding, *inter alia*, that Rumery

[1] Appellant's state law claims alleged negligence, defamation, false imprisonment, negligent infliction of emotional distress, and state constitutional violations.

is a knowledgeable, industrious individual with extensive experience in the business world, that he carefully considered whether to sign the covenant not to sue, and that he was represented by competent and experienced counsel. This appeal followed.

II.

Whether a covenant not to sue public officials, executed in exchange for a decision to *nolle prosequi*, is void *ab initio* is an issue of first impression under § 1983 in this Circuit. Federal law determines the validity of this release of federal constitutional rights. *Jones* v. *Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981); *Boyd* v. *Adams*, 513 F.2d 83, 87 (7th Cir. 1975). There is no need, therefore, for us to examine New Hampshire law on the issue.

We recognize that our sister federal courts of appeals have reached varying results in determining the validity of releases of the right to sue for alleged violations of constitutional rights negotiated in the criminal law context. Appellees urge us to embrace the approach adopted by the Ninth and Fourth Circuits in cases which involved an analysis of whether the releases were executed in a voluntary, informed and deliberate manner.

In *Jones*, *supra*, the Ninth Circuit focused on objective factors in determining the validity of a release negotiated in exchange for $500. Following his conviction but awaiting sentencing, Jones alleged that he was taken from his cell, stripped, gagged, chained to a wall, hosed with cold water, beaten with a nightstick, and placed in a segregation cell for nineteen days. In holding that there was a triable issue of fact as to the voluntariness of the release of public officials' liability precluding summary judgment, the court considered such factors as the coercive environment, the absence of an attorney, and the pending sentencing. In this post-conviction context, the Ninth Circuit directed courts to examine whether the release was "voluntary, deliberate and informed." *Jones*, *supra*, 648 F.2d at 1203.

Appellees also rely on the Fourth Circuit's decision in *Bushnell* v. *Rossetti*, 750 F.2d 298 (4th Cir. 1984), where the court rejected the argument that *all* agreements releasing civil rights in exchange for criminal sentencing consideration should be void as against public policy. The court instead applied the "voluntary, deliberate, and informed" standard. *Bushnell*, *supra*, 750 F.2d at 302 (citing *Jones*). Bushnell had been arrested and convicted for disorderly conduct and resisting arrest. In exchange for Bushnell's promise to dismiss with prejudice his civil rights claim against public officials, counsel for defendants police, mayor, and city council suggested to the prosecutor that he recommend probation at the sentencing hearing. The Fourth Circuit specifically limited its decision to release agreements negotiated after a determination of guilt but before sentencing, reserving for a later day the issue of the validity of a release exchanged for dismissal of criminal charges negotiated in a noncoercive environment. *Bushnell*, *supra*, 750 F.2d at 301 n.*. The potential for prosecutorial abuse, exacting releases of related civil rights claims or retaliating for civil prosecution of such cases by threatening a claimant with charges, did not exist in the post-conviction setting according to the *Bushnell* court. *Id.* at 301. Moreover, the court stressed that "the potential for forestalling exposure of possibly unconstitutional or illegal government practices" is not present because the police practices that were the subject of the § 1983 claim were already "exposed to full public inquiry when the dismissal agreement was executed." *Id.*

We decline appellees' invitation to apply the *Bushnell* and *Jones* holdings to the pre-conviction situation involved in the instant case. Rumery executed his covenant not to sue while a criminal charge of witness tampering was still pending. The deputy county attorney was in a position to use the threat of prosecution as a sword while simultaneously shielding public officials from a civil rights claim. The public policy considerations which the *Bushnell* court found inapplicable in the post-

conviction setting indeed may be invoked appropriately in the instant case.

III.

The need closely to scrutinize contracts or agreements in the criminal law context is particularly important because of the special relationship between a criminal prosecution and the public interest. Courts ordinarily are reluctant to set aside a contract provision in an ordinary agreement because, no matter how badly off one of the parties may be, the agreement is likely to benefit both parties in some way. But an agreement in the criminal context is different. Since the object of a criminal prosecution is to vindicate the public, not a private individual, an agreement not to prosecute should be upheld only where the *public* interest is served.[2] It is difficult to envision how release agreements, negotiated in exchange for a decision not to prosecute, serve the public interest. Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights. We agree with those courts which have found that such releases have the effect of injuring the public interest.

In *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975), Judge Cummings specifically addressed the validity of a release executed after arrest but before conviction. Ms. Boyd's § 1983 claim against police officers and city officials alleged that the officers stopped and searched automobile passengers, found nothing incriminating, pushed the claimant against the car, used

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[2] We note the distinction between covenants not to sue for deprivations of constitutional rights in the context of a criminal prosecution and our decision today in *Premier Electric International Corp.* v. *Solar Devices, Inc.*, 778 F.2d 71 (1st Cir. 1985), which upholds a covenant not to sue exchanged for the adverse party's voluntary relinquishment of materials sought during the discovery stage of a civil case. The policy considerations which we find controlling here do not apply in *Premier Electric*.

abusive language, and incarcerated the claimant for five hours. Boyd claimed that she suffered a miscarriage as a result.

In addition to finding an inherently coercive environment at the time Boyd executed the covenant not to sue by virtue of the defendant's release on conditional recognizance bail and the inability to pay fines, the Seventh Circuit held that the release was void as against public policy. *Boyd*, *supra*, 513 F.2d at 88. [3] Similarly, in *Horne* v. *Pane*, 514 F. Supp. 551, 552 (S.D. N.Y. 1981), the court recognized that a defendant forced to choose between filing a civil rights claim and being prosecuted on a criminal charge cannot make an uncoerced choice as a matter of law.

The policy considerations underlying our decision were well stated in *Dixon* v. *District of Columbia*, 394 F.2d 966, 968-69 (D.C. Cir. 1968), a case where the prosecutor filed traffic charges when the defendant reneged on his agreement not to sue.

> "The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances.
>
> * * *
>
> The major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. Much more important, these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society. And they tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint."

And in a case where the claimant was arrested for driving under the influence and the prosecutor moved to drop charges if the defendant would stipulate to probable cause, foreclosing a claim against the police, the Ninth Circuit forcefully stated:

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[3] As in *Boyd*, we reject the argument that, because Rumery's lawyer may have been instrumental in negotiating the release, the release should be upheld. *See Boyd*, *supra*, 513 F.2d at 88.

> "It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against the policemen, even where the civil case arises from the events that are also the basis for the criminal charge. We do not mean that the prosecutor cannot present such a criminal charge. What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case."

MacDonald v. *Musick*, 425 F.2d 373, 375 (9th Cir. 1970). *See also Horne* v. *Pane, supra.*

In addition to the policy considerations referred to above, we recognize that an exception to the general rule of invalidating such releases would pose administrative problems. Any exception is likely to promote police or prosecutors' efforts to obtain such releases. This would require an extensive investigation into whether the release indeed was made free of coercion. Moreover, the need for an exception to the invalidity of such releases is small. Where the prosecution is overreaching, acts unreasonably, or has a weak criminal case, the exception is not appropriate. A release of a civil rights claim might arguably be given effect where the prosecution acts reasonably and has a fairly good case against the claimant. But in such a case, a good defense to a civil rights claim will exist and the need for a release will not come into play. Thus, the exception to the general rule of invalidity has the anomalous character of not applying where the police may desire it, and applying where they do not need it. We hold that an exception cannot easily be shown important enough to outweigh its administrative burdens.

Here, the execution of the covenant not to sue in exchange for a decision not to prosecute Rumery on a witness tampering charge blocked Rumery's claim of police misconduct—conduct allegedly in violation of his constitutional rights. Although we recognize the latitude which prosecutors necessarily must have in determining whether to prosecute criminal charges, a

criminal defendant's decision to assert a civil rights claim is not a factor which the prosecutor should consider. In such a situation the prosecutor alone is holding the trump card to be played for the protection of those against whom a potential civil rights claim may be asserted. This finesse is too injurious to the public interest to be sanctioned. We decline to do so.

IV.

To summarize: We hold that a covenant not to sue public officials for alleged violations of constitutional rights, negotiated in exchange for a decision not to prosecute the claimant on criminal charges, is void as against public policy. We do not address on this appeal the merits of Rumery's federal civil rights claim. We hold only that appellees' reliance on the affirmative defense of the covenant not to sue cannot stand. We reverse and remand for proceedings consistent with this opinion.

Reversed.

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

C 84-279-L

BERNARD E. RUMERY, JR.

v.

TOWN OF NEWTON, ET AL.

ORDER ON MOTION TO DISMISS/AND OR PETITION FOR DECLARATORY JUDGMENT

The court makes the following findings of fact. The plaintiff instituted suit against the defendants as a result of his arrest on May 12, 1983 by defendant, David T. Barrett, Chief of Police of the Town of Newton.

Plaintiff was charged with the offense of tampering with a witness in connection with a case of aggravated felonious sexual assault. Criminal charges were later dropped against the plaintiff.

An evidentiary hearing was held on March 27, 1985. Three witnesses including the plaintiff testified. Additionally, Deputy County Attorney for Rockingham County, Brian R. Graf for the past four and a half years[,] was deposed on March 22, 1985 as he was in California on the date of the hearing. He became involved in the case of the *State of New Hampshire* v. *Champy*. The case involved an allegation that Champy had committed an aggravated felonious sexual assault on Mary Deary.

Champy had been indicted by the grand jury.

Chief Barrett indicated to Graf that Mary Deary had reported to the Newton Police that Mr. Rumery had made statements to the effect that if she were to go forward on the David Champy case she might end up like the two women in Lowell,

Massachusetts; he believed there was a reference in the report to an apparent murder of two women in Lowell, Massachusetts. Subsequently, Chief Barrett advised him that an arrest had been made. He had discussions with plaintiff's counsel in the criminal action, Stephen Woods, who is presently County Attorney for Rockingham County. A topic of discussion was that the State would be willing to drop the prosecution of the plaintiff for the witness tampering charge in exchange for the plaintiff signing a release indicating that he would not sue the parties involved in the particular case. He had further been advised by Chief Barrett that Mary Deary did not want to testify against the plaintiff. Also taken into consideration was the trauma if Mary Deary was forced to testify against the plaintiff.

Eventually an agreement was reached with Attorney Woods. All criminal charges were going to be disposed of and all civil actions he might have would also be done away with. This was accomplished. See exhibit A. He did not believe that he had anything to do with drafting the covenant not to sue. No pressure was exerted by him to have the plaintiff sign the covenant. He didn't know if they would have forced Mary Deary to testify.

Graf had no conversation with any of the other defendants to this action.

Stephen Woods who represented the plaintiff testified. On April 5, 1983 he was associated with Attorney Robert Shaw of Exeter, New Hampshire.

After the arrest of the plaintiff he spoke to Chief Barrett, but mainly dealt with Attorney Graf as Deputy County Attorney.

He stated the plaintiff was aware of the possibility of a civil action. Woods called Graf suggesting that the case be *nolle prosequi*. He could not recall who suggested the covenant not to sue.

Woods met in the office with the plaintiff and in his office discussed the covenant not to sue which he drafted. The conference lasted about an hour. He told the plaintiff that by sign-

ing the covenant he would forego all actions. Plaintiff wanted to give it further thought. His impression was that the plaintiff had the impression there was no civil claim if he signed.

Three days thereafter he called the plaintiff who stated that he decided to sign it. Plaintiff signed it in Wood's office and received a copy of the covenant.

Exhibit B is a letter dated May 19, 1983 from the Plaistow District Court to Attorney Woods scheduling a probable cause hearing.

He stated that without a covenant not to sue that the case would not have been *nolle prosequi*.

Exhibit 1 is a letter from Woods to the Plaistow District Court stating his understanding that all charges against the plaintiff had been *nol prossed* by the State.

The plaintiff is 55 years old and is a marketing representative of John Hancock Life Insurance Company. He is married and lives in Danville, New Hampshire. He has known Mary Deary for four or five years and he aided her after her husband's death. Champy was a friend that he had gone hunting with.

In a telephone conversation on May 11, 1983 with Mary Deary he informed her that Champy's wife had left him. Further he informed her that if she did not want to hurt Champy, she could call the county attorney and ask him to drop the charges. According to the plaintiff the conversation was innocuous and no threats made to Deary.

The next day at 10:30 P.M. he was arrested by Chief Barrett who was accompanied by another police officer. Miranda rights were read to him. Plaintiff called a neighbor who is a state trooper who advised him to cooperate and to get counsel. Subsequently, he was booked at Brentwood, then bailed.

Plaintiff then went to see Attorney Robert Shaw who had his associate, Woods, handle the case.

He was advised that if he signed the covenant it would be the end of the matter, but he was reluctant to do so.

Woods told him that if convicted, he would not be the first innocent person who had been jailed; further, that he would be indicted although he was innocent. He was afraid of going to jail. He stated that he read the covenant before he signed it, but only partially understood it.

Plaintiff's wife, Mary Rumery testified that they have been married for thirty-two years and have two children.

On one occasion she was on a telephone extension when Woods and the plaintiff were discussing the covenant. She told Woods, "I thought you were a fighter". She adamantly protested when the plaintiff signed the covenant.

In addition to the foregoing the court specifically finds that the plaintiff is a knowledgeable, industrious individual with vast experience in the business world. Further, he intelligently and carefully, after weighing all the factors, concluded, that it would be in his best interest and welfare to sign the covenant. He was also represented by a very competent attorney with more than ordinary expertise in the sometimes complex area of criminal law. The State and its subdivisions which includes all defendants by agreeing to the covenant through its authorized representative, Graf, gave up a potential defense to a possible lawsuit (which turned out to be an actual lawsuit).

The law on this issue as far as this court is concerned has never been determined by the First Circuit Court of Appeals and there is diversity in the case law.

Boyd v. *Adams*, 513 F.2d 83 (7th Cir. 1975). Facts: Plaintiff was in car and was stopped and forcefully searched. Abusive language was used and she was detained for five hours; a miscarriage resulted. Criminal charges were disorderly conduct, resulting in arrest. The charges were dismissed upon the plaintiff's agreeing to sign a release which she did. Plaintiff stated that she signed under duress, coercion and fear of further punitive and harassing action.

At page 87 is the following.

> . . . The question presented by plaintiff's contention is a purely federal one, whether a release executed under the circumstances presented here constitutes a valid waiver of plaintiff's constitutional rights. We need not consider whether the release would be valid in a suit based on Illinois tort law, because plaintiff has brought suit under a federal statute in federal court alleging deprivation of rights secured by the federal constitution.
>
> While the Supreme Court has recognized that one may voluntarily relinquish constitutional rights, it has also required that such relinquishments be entered into voluntarily under all of the circumstances presented. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222-234, 248, 93 S. Ct. 2041, 36 L.Ed.2d 854. The district court held the instant release valid because it found that plaintiff had knowingly waived her right to pursue civil claims against defendants and because no coercion or duress of any sort had been exerted upon her. We cannot agree. After her arrest, plaintiff was held in custody for five hours until her mother posted a bond. At the time plaintiff executed the release, she still was on conditional recognizance bail. Her uncontested testimony was that she would not be able to pay the disorderly conduct and resisting arrest fines.

It is immaterial that plaintiff's counsel commenced the discussion. The inherently coercive character of such a situation is not dependent upon which party first suggested the release since the very existence of the well-known release practice invited plaintiff's counsel to enter the negotiations.

> The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances.

Boyd v. *Adams*, *supra* at 88.

In *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981) Plaintiff Jones was held in the county jail awaiting sentence. On July 3,

1976 he was taken from his cell and beaten and abused for 3 to 5 hours. He signed a release not to sue in exchange for $500.

The conditions affecting the validity of a release of significant federal rights are eminently a matter of federal law. *Jones* v. *Taber*, 1203, citing *Boyd* v. *Adams*, *supra*.

A release of claims under section 1983 is valid only if it results from a decision that is voluntary, deliberate and informed. *Id.*, citing *Boyd supra* at 87-88, cf. *McCarthy* v. *Cahill*, 249 F. Supp. 194 (D. D.C. 1966).

The burden is always on the party advancing an affirmative defense to establish its validity. *Jones* v. *Taber* at 1203.

Defendant relying on section 1983, releases signed by prisoners, must meet the same standards of validity applicable to maritime releases. *Id.* at 1204.

> Although we do not find cases which analyze the necessary criteria of validity for a section 1983 release, we find adequate and instructive guidance from decisions interpreting maritime releases. "A party who attempts to rely on a maritime release has the burden of proving its validity. *Charpentier* v. *Fluor Ocean Servs., Inc.*, 534 F.2d 71, 72 (5th Cir. 1976). See generally, *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 246-249, 63 S. Ct. 246, 251-52, 87 L. Ed. 239 (1942). Of course, the burden is always on the party advancing an affirmative defense to establish its validity. The special significance of maritime release cases is that a release's validity must be predicated on an unusually strong showing that the nature and extent of the seaman's injuries and the shipowner's potential liability for them was explained clearly to the seaman in circumstances where his signing of the release was quite free and intelligent. In maritime cases, a seaman's release of claims for injuries cannot be relied on by a shipowner otherwise liable for the injury unless the shipowner can affirmatively demonstrate that the claimant understood the nature of whatever statutory and common-law remedies he waived by the release. See, *Charpentier*

v. *Fluor Ocean Servs., Inc.*, 613 F.2d 81, 84 (5th Cir. 1980) (after remand). See also *Strange* v. *Gulf & South American Steamship Co.*, 495 F.2d 1235 (5th Cir. 1974); *Blanco* v. *Moran Shipping Co.*, 483 F.2d 63 (5th Cir. 1973).

In *Bushnell* v. *Rossetti, et al.*, 750 F.2d 298 (4th Cir. 1984) the plaintiff, an attorney claimed and the court stated that,

> . . . for the purposes of reviewing the summary judgment we must assume that the arresting officers subjected him to a variety of tortious conduct including assault, battery, defamation, false imprisonment and conversion of Bushnell's property. On that basis Bushnell brought this federal civil rights action under 42 U.S.C. § 1981, *et seq.*, against the police officers, the Baltimore Police Chief and the Mayor and City Council of Baltimore alleging deprivation of constitutional rights without due process.
>
> In the district court Bushnell conceded he had agreed to dismiss this suit with prejudice in exchange for the November 1982 sentencing consideration, and conceded that the civil defendants had fulfilled their part of the agreement. Bushnell argued however that the entire agreement was void as against public policy and thus should not be enforced by the district court.
>
> Bushnell contends broadly that all agreements releasing civil rights in exchange for criminal sentencing consideration are void as against public policy.

In affirming the summary judgment for the defendants the court stated:

> Here, the record clearly supports the determination that Bushnell's decision to release was voluntary, deliberate, and informed and so entitled to enforcement. Bushnell himself is an attorney and was fully aware of the legal consequences of the release agreement he struck with the defendant's counsel. The agreement was executed only after Bushnell had consulted privately with his own attorney. Bushnell obviously received a considerable benefit from the agreed exchange.

Defendant's counsel had approached Bushnell and his attorney only after Bushnell had been found guilty of disorderly conduct and resisting arrest. The determination of guilt had by then removed the possibility that the charges against Bushnell were fabricated in order to coerce him into releasing his civil claim against the city and its agents.

Plaintiff's assertion that the covenant not to sue is defective because it does not specifically set forth the individual name or names of the various defendants, i.e. selectmen or Chief Barrett is without merit.

The court grants the defendant's motion to dismiss. The court had made its own detailed findings of fact and in accordance with Rule 52 respectfully declines to rule on defendant's requests for findings of fact and rulings of law. *U.S.* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944).

April 29, 1985

s/ MARTIN F. LOUGHLIN

MARTIN F. LOUGHLIN
U.S. District Judge

G. WELLS ANDERSON, ESQ.
CHARLTON J. SWASEY, ESQ.
JAMES S. YAKOVAKIS, ESQ.
DONALD E. GARDNER, ESQ.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 84-279-L

BERNARD E. RUMERY, JR.

v.

TOWN OF NEWTON, ET AL

JUDGMENT

In accordance with the ORDER ON MOTION TO DISMISS/AND OR PETITION FOR DECLARATORY JUDGMENT by the Honorable Martin F. Loughlin, United States District Judge, dated April 29, 1985, judgment is hereby entered.

By the Court,

s/ JAMES R. STARR
Clerk

April 30, 1985

cc: G. WELLS ANDERSON, ESQ.
CHARLTON J. SWASEY, ESQ.
JAMES S. YAKOVAKIS, ESQ.
DONALD E. GARDNER, ESQ.

APPENDIX C

The judgment of the Court of Appeals for the First Circuit sought to be reviewed was entered on December 2, 1985, and is set forth in Appendix A, *supra*. No separate decree or order was entered by the Court of Appeals herein. No rehearing was sought.

APPENDIX D

CONSTITUTIONAL PROVISIONS

First Amendment to the Constitution of the United States:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the Constitution of the United States, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

42 U.S.C. § 1983 (in pertinent part):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

N.H. RSA 641:5 (in pertinent part):

A person is guilty of a class B felony if

> I. believing that an official proceeding. . .or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to. . .
>
> > (b) withhold any testimony, information, document or thing; . . .

N.H. RSA 641:5, I(b).

APPENDIX E

COVENANT NOT TO SUE

Covenant not to sue executed on June 6, 1983 by Bernard Rumery, of 26 Pine Street, in the Town of Danville, County of Rockingham, State of New Hampshire, herein referred to as covenantor, to Mary A. Deary, of 64 Highland Street, Town of Newton, the Police Department of the Town of Newton, and the Town of Newton, all of the County of Rockingham, the State of New Hampshire, herein referred to collectively as covenantee.

In consideration of the cessation and withdrawing of all criminal charges against the covenantor brought as a result of a claim by the first named covenantee, the covenantor does hereby agrees [sic] as follows:

1. *Covenant not to sue.* Covenantor will never institute any action or suit at law or in equity against covenantee, nor institute, prosecute or in any way aid in the institution or prosecution of any claim, demand, action, or cause of action for damages, costs, loss of services, expenses, or compensation for or on account of any damage, loss or injury either to person or property, or both, whether developed or undeveloped, resulting or to result, known or unknown, past, present, or future, arising out of the criminal charges lodged against and subsequent arrest of the covenantor.

2. *Binding effect of covenant.* This covenant shall inure to the benefit of covenantee and their heirs, assigns, successors, and legal representatives. It shall bind covenantor, his heirs, and legal representatives.

3. *Entirety clause.* This instrument reflects the entire covenant between covenantor and covenantee, and no statements, promises, or inducements made by covenantor or any agent of covenantor that are not contained herein shall be valid or binding.

4. *Covenant understood by covenantor.* Covenantor has carefully read the foregoing covenant not to sue and knows the content thereof.

In witness whereof, covenantor has executed this covenant at EXETER, N.H. the day and year first above written.

s/ BERNARD RUMERY
BERNARD RUMERY

State of New Hampshire
Rockingham, ss.

Personally appeared the above-named, Bernard Rumery, and made oath that the foregoing is true to the best of his knowledge and belief.

s/ STEPHEN J.C. WOODS
Justice of the Peace

Supreme Court, U.S.
FILED
APR 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1449

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

G. WELLS ANDERSON
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I

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a covenant not to sue public officials for violations of constitutional rights, extracted under the threat of criminal indictment and prosecution, and obtained for dismissal of criminal charges, is void *ab initio* as against public policy.

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In the
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1449

TOWN OF NEWTON, ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinions below are adequately set forth in the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Constitutional and Statutory Provisions

The constitutional and statutory provisions are adequately set forth in the Petition.

Counter-Statement of the Case

Factual Setting

Mr. Rumery is a middle-aged insurance representative who has lived in Newton, New Hampshire, a small New England village, all his life. Rumery is a family man with no prior arrests or criminal record. In Spring, 1983, after reading in a local newspaper that David Champney, an acquaintance of Rumery's, had been charged with felonious sexual assault, Rumery telephoned Mary Deary, a business and social acquaintance of Rumery, to inquire whether she knew about the incident. Rumery learned during that telephone conversation that Deary was the victim of the assault by Champney. Rumery and Deary had no further communications until May 11, 1983, when Deary telephoned Rumery. Deary initiated the telephone conversation with social conversation, but then expressed to Rumery her reluctance to go forward with the criminal charge against Champney because she was confused and distraught about the incident. The text of the telephone conversation was as follows:

> Deary: "I don't know what to do. I don't want to hurt him. I don't know what to do."
>
> Rumery: "Well if you feel that way towards him then you can—it's possible to, to end this case. It's possible to stop the case."
>
> Deary: "Well I was told I couldn't."
>
> Rumery: "Well you can call the County Attorney if you want and talk to them about i "
>
> Deary: "I'm not a bad person. I'm not vindictive."
>
> Rumery: "Well that's up to you. That's all I can say. Look Mary, I have to leave. I have an appointment. If you want to call me I'll be in the office at 11 o'clock tomorrow morning."

On the very next day, Rumery was arrested by Newton Police Chief Barrett and charged with a Class B Felony of tampering with a witness. (N.H. R.S.A. 641:5). Rumery, who had never even received a motor vehicle violation, was arrested at his home in front of his wife, handcuffed and transported to the County Jail.

Prior to making the arrest of Rumery, Chief Barrett chose not to request authorization for a wiretap; nor did he attempt to obtain a sworn affidavit from Deary; nor did he attempt to obtain any other corroborating evidence whatsoever. Rockingham County Deputy Prosecutor Brian Graf was "surprised" about the arrest of Rumery and concerned about the lack of independent corroborating evidence of the alleged witness-tampering charge.

Rumery retained Stephen Woods as counsel to defend him on the felony charge, and was scheduled to be indicted by the Rockingham Grand Jury on June 13, 1983. A probable cause hearing was also scheduled for Plaistow District Court on June 14, 1983.

Having had no prior exposure to the criminal justice system, and being innocent of the charge, Rumery was in an extremely excitable and emotional state of mind throughout the ordeal and was visibly distraught.

Attorney Woods and Prosecutor Graf discussed the possibility that the criminal prosecution of Rumery could be *nolle prossed* if Rumery agreed to sign a covenant not to sue the persons connected with his arrest. Prosecutor Graf indicated that if Rumery did not sign a covenant not to sue, the criminal process would continue, which included grand jury indictment and a probable cause hearing.

When presented with the covenant not to sue, Rumery was adamant against signing the covenant. Since Attorney Woods' goal was to clear Rumery of the criminal charge in one way or another, however, Woods recommended signing the covenant. Woods testified later that he had little, if any, concern about a potential civil suit by Rumery against public officials

and did not discuss with Rumery any details or specifics about the nature or type of civil rights and remedies Rumery possessed against public officials as a result of his arrest.

Rumery was told that if he did not sign the covenant not to sue, the felony charges would continue and that he would be indicted, in all likelihood, by the grand jury and face a probable cause hearing.

Under the threat of indictment and continued criminal prosecution, Rumery signed the covenant not to sue the public officials connected with his arrest on June 6, 1983. Thereafter, the criminal charges were *nolle prossed* by the prosecution.

Jurisdictional Setting

Rumery filed a Complaint in the United States District Court for the District of New Hampshire alleging deprivations of federal rights pursuant to 42 U.S.C. § 1983 and the 14th Amendment to the United States Constitution, as well as pendent state law claims of negligence, defamation, false imprisonment, negligent infliction of mental distress and state constitutional violations arising from his arrest for witness tampering. A Motion to Amend the Complaint was also filed alleging that Prosecutor Graf was acting as agent for defendants in his role to obtain the forfeiture of Rumery's significant federal and state rights by way of the covenant not to sue. Petitioners Town of Newton, Chief Barrett and the Selectmen pleaded the covenant not to sue as an affirmative defense and filed a Motion to Dismiss and/or Petition for Declaratory Judgment. Respondent objected on the grounds that the covenant not to sue was void *ab initio* as contrary to public policy; and in the alternative, that Respondent was entitled to a jury determination on the covenant, rather than an evidentiary hearing before the District Court Judge. The District Court Judge dismissed the Complaint on the grounds that the covenant not to sue was valid. Judgment was entered on April 30,

1985. Respondent filed an appeal with the Court of Appeals for the First Circuit in a timely fashion which reversed and remanded the District Court opinion on the grounds that the covenant not to sue was void as against public policy. The Circuit decision below was rendered on December 2, 1985, and Petitioners filed their Petition for a Writ of Certiorari with this Court.

Argument

I. There Is No Conflict Among the Circuits.

Petitioners claim that the First Circuit decision below is in conflict with opinions from the Fourth and Ninth Circuits: such is not the case. The three Circuit opinions, when properly understood, are not in conflict at all. *Bushnell* v. *Rossetti*, 750 F.2d 298 (4th Cir. 1984) and *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), are not in conflict with *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985) because *Bushnell* and *Jones* dealt with distinctly different legal and factual issues from the case at bar. *Bushnell* and *Jones* concerned releases which were executed *after* criminal convictions were obtained; whereas, the case at bar concerns a release extracted *before* criminal adjudication while criminal charges were still pending. Judge Timbers, writing the unanimous decision below, clearly distinguished between "pre-conviction" and "post-conviction" release/dismissal practices. *Rumery* v. *Town of Newton*, 788 F.2d 66, 69 (1st Cir. 1985).

In *Bushnell* v. *Rossetti*, 750 F.2d 298 (4th Cir. 1984), the Fourth Circuit specifically limited its opinion to release/dismissal arrangements negotiated after a determination of guilt but before sentencing. *Bushnell*, 750 F.2d at 301 fn. The Fourth Circuit stated that it had "no quarrel" with the holdings in those cases dealing with "pre-conviction" release/dismissal arrangements because of the "different contexts presented in those cases". *id.* at 301.

In *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), the Court also was presented with a release/dismissal arrangement negotiated after conviction and while awaiting sentence. *Id.* at 1202. The Ninth Circuit distinguished the Seventh Circuit decision of *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975) which dealt with a "pre-conviction" release/dismissal arrangement. The *Jones* court noted that the *Boyd* decision did not say "*when*" a release might be valid. *Jones*, 648 F.2d at 1203 (emphasis added). "When" a release *might* be valid according to *Jones*, is limited to "post-conviction" arrangements while awaiting sentence. *Jones* at 1205-06.

Thus, *Bushnell* and *Jones* present very different legal and factual issues from those issues presented in the First Circuit decision below.

Legitimate and compelling reasons for applying different standards of review to "post-conviction" and "pre-conviction" releases are that in the post-conviction situation:

1. "The potential for prosecutorial abuse, exacting releases of related civil rights claims or retaliating for civil prosecution of such cases by threatening a claimant with charges, [does] not exist in the post-conviction setting. . . ." *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985), *citing Bushnell*, 750 F.2d at 301;
2. "[T]he police practices that [would be] the subject of [a]§ 1983 claim [would have been] already 'exposed to full public inquiry when the dismissal agreement was executed.' " *Rumery*, 778 F.2d at 69, *quoting and citing Bushnell*, 750 F.2d at 301; and
3. "A determination of guilt after a completed criminal adjudication necessarily involves inquiry into and rejection of a claimant's defense based on the very police conduct challenged under a § 1983 claim." *Bushnell*, 750 F.2d at 301.

Whereas, in the "pre-conviction" situation, the potential for police and prosecutorial abuse is just "to injurious to the public interest to be sanctioned". *Rumery*, 778 F.2d at 70.

Petitioners' claim of conflict of opinion among the Circuits on the same matter as presented in the case at bar is illusory and does not merit this Court's grant of certiorari.

II. There Is Uniformity Among the Circuit Decisions on the Same Matter.

The decision below is fully in accord with the only two Circuit decisions in which the same legal and factual issues have been squarely presented. In *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975), the Seventh Circuit specifically addressed the invalidity of a release executed after arrest but before a determination of guilt or innocence by criminal trial. Judge Cummings, writing for a unanimous court, held that the "pre-conviction" release was void *ab initio* as against public policy. *Id.* at 88. Similarly, in *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), the Circuit Court addressed a "tacit agreement" to release civil rights claims in exchange for *nolle prosse* of criminal charges prior to criminal trial. Chief Justice Bazelon struck down the arrangement and declared:

> The major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. *Much more important, these agreements suppress complaints against police conduct which should be thororoughly aired in a free society.* And they tempt the prosecutor to trump-up charges for use in bargaining for suppression of the complaint. *Id.* at 969 (emphasis added).

The decision below also is fully in accord with the only reported District Court decision concerning the same legal and factual issues presented in the case at bar. In *Horne* v. *Pane*, 514 F.Supp. 551 (S.D.N.Y. 1981), the Court addressed a

release executed after arrest but prior to conviction. The court declared the release invalid as a matter of law and stated:

> It seems to us beyond question that a criminal defendant forced to choose between being prosecuted on criminal charges on the one hand, and not being prosecuted but giving up certain constitutionally guaranteed civil rights on the other, cannot as a matter of law make an uncoerced choice. *Id.* at 552.

Thus, the decision below is in full accord with the three federal court decisions which have squarely addressed the invalidity of releases extracted after arrest, but while criminal charges were still pending.

The Circuit decision below declined Petitioners' invitation to apply "post-conviction" case holdings to the "pre-conviction" situation involved in the instant case. *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985). Petitioners' attempt to create a conflict among the Circuits for the purpose of their Petition, where no such conflict exists, is without merit.

III. There Is No Important, Pressing Question of Federal Law.

The issue in the present case is narrow and unique to its facts and no amount of rhetoric can create it into one warranting review on certiorari.

The release/dismissal practice in a "pre-conviction" context is a very limited practice employed by police and prosecutors. This fact is evidenced by the dearth of cases on the issue: two Circuit decisions and one District decision. Even taking the "post-conviction" release/dismissal practice into consideration, it is apparent that police and prosecutor's efforts to obtain such releases is not widespread. The present issue is not a pressing one, crying out for consideration, at least not at this time, which would warrant this Court's review.

There is no merit to Petitioners' contention that the Circuit decision below raises an important question of federal law. Petitioners read the decision below too broadly. Petitioners erroneously believe that the Circuit decision below applies to both pre-conviction and post-conviction situations. Such is not the case.

Petitioners assert that the decision below "places an unwarranted constraint on prosecutors" and "too narrowly defines the public interest". On the contrary, the Circuit decision below recognizes "the latitude which prosecutors *necessarily must have* in determining whether to prosecute criminal charges". *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985) (emphasis added). What the Court says, however, is that a prosecutor must determine whether to *nolle prosse* with only the public interest in mind. The Circuit decision below does not constrict a prosecutor's discretion so long as his/her discretion is restricted to public interests and does not include private interests. If a prosecutor determines that criminal charges should be dismissed, then the prosecutor's plain duty is to dismiss the charges without stipulations or private benefits. "No authority permits a prosecutor to consider personal or private advantages that might accrue to himself or to third parties from the exercise of his power". *Hoines* v. *Barney's Club, Inc.*, 620 P.2d 628, 635 (Cal. 1980) (Tobriner, J., dissent). Permitting a prosecutor to consider a third party's interest not only undermines the legitimate objectives of a prosecutor's discretion, but also injures the public interest.

Moreover, no legitimate public objective is advanced by a prosecutor obtaining a covenant not to sue other public officials in exchange for an arrangement to *nolle prosse* criminal charges. As the Ciruit Court below recognized:

> A release of a civil rights claim might arguably be given effect where the prosecution acts reasonably and has a fairly good case against the claimant. But in such a case, a

> good defense to a civil rights claim will exist and the need for a release will not come into play. Thus, the exception to the general rule of invalidity (of such releases) has the anomalous character of not applying where the police may desire it, and applying where they do not need it. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985).

IV. The Decision Below Is Correct and Reasonable.

In addition to correctly applying legitimate public policy considerations to a "pre-conviction release/dismissal arrangement," the decision below recognized "administrative problems" such releases would present if Petitioners' *ad hoc* balancing approach were adopted. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985). Such an approach would not only promote, but would encourage, police and prosecutors routinely to obtain such releases. These practices would require extensive investigations into whether the release/dismissal arrangements were made knowingly, willingly and freely in a non-coercive environment. *Id.* at 70.

Conclusion

It is respectfully submitted that Petitioners have failed to sustain their burden of establishing that there are special and important reasons why a Writ of Certiorari should be granted. The decision below did not decide a federal question in conflict with applicable decisions of this Court or of any other Court of Appeals on the same matter; nor does the decision below involve an important question of federal law which needs to be settled by this Court. The Court of Appeals for the First Circuit correctly held that the covenant not to sue public officials for alleged violations of constitutional rights, negotiated in exchange for a decision not to prosecute on criminal charges, is void as against public policy.

Respectfully submitted,

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---

* Counsel of Record for Respondent

(6)

Supreme Court, U.S.
FILED
JUN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1449

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ETC., ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 28, 1986
CERTIORARI GRANTED APRIL 21, 1986

6/1/87

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

No. C.84-279-L

BERNARD E. RUMERY, JR.

v.

TOWN OF NEWTON, et al.

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1984		
Apr 13	1	Cmplt/JURY DMD.
Apr 16		Sms issd
26	2	Summons with Deputy Sheriff's Returns on all defendants dated 4/18/84
May 4	3	APPEARANCE for Deft Barrett by Charlton J. Swasey, Esq.
	4	ANSWER of Deft Barrett w/ Jury Dmd.
9	5	SPECIAL APPEARANCE for all defendants by James S. Yakovakis, Esq.
	6	Dft's Motion to Extend Time for Filing Answer to 6/15/84
23		On #6, Mot. gr. Rule 11. (KN) (EOD 5/23/84) cc attys
Jul 2	7	APPEARANCE for Barrett as Chief and Town of Newton by Devine, Millimet, Stahl & Branch — Donald E. Gardner, Esq.
Jul 5	8	Defts' ANSWER
Sept 13		PRELIMINARY PRETRIAL HELD BEF. BARRY, MAG.
20	9	PRETRIAL ORDER (WHB) (EOD 9/21/84) cc attys (dfts to file Mot. to Dis. by 12/15/84, Plff to resp. by 1/1/85) (if case not dismissed on motion, further pretrial to be set)

DATE	NR	PROCEEDINGS
Dec 14	10	Defts' Mot for Ext of Time to File Mot to Dis/SJ to 2/15/85
26		On #10, Mot. gr. R11. (JRS) (EOD 12/27/84) cc attys
1985		
Feb 15	11	Dfts' Motion to Dismiss/Petition For Declaratory Judgment
	12	Dfts' Memo in Support of Motion to Dismiss/ Petition for Declaratory Judgment
22	13	Plff's Obj. to Dfts' Motion to Dismiss/Petition For Declaratory Judgment
	14	Plff's Mot to Ext Time to File Memo in Opp to Mot to Dismiss/Petition for Declaratory Judgment to 3/4/85
		On #14, Mot. gr. R11. (JRS) (EOD 2/22/85) cc attys
	15	Plff's Motion to Amend Complaint to Add Count VII
Mar 4	16	Pltf's Memo of Law in Support of Obj to Defts' Mot to Dis/Pet for Declaratory Judgment
6	16½	Defts' Mot to Disallow or, in the Alternative to Dis Count VII w/ Memo
14	17	Dfts' Reply Memo Supporting Motion to Dismiss/Petition for Declaratory Judgment
15	18	Plff's Obj. to Dfts' Mot to Disallow Or, In the Alternative, to Dismiss Count VII of the Complaint, if Amended
	19	Memo of Law In Support of Plff's Obj. to "Dfts' Mot to Disallow or, in the Alternative, to Dismiss Count VII of the Complaint, if Amended"
	20	Addendum to Dfts' Reply Memo Support Motion to Dismiss/Petition For Declaratory Judgment
Mar 25	21	WITHDRAWAL by Charlton J. Swasey, Esq.

DATE	NR	PROCEEDINGS
1985		
Mar 27	21½	Defts' Reqs for Findings of Fact and Rulings of Law RE Covenant Not to Sue Executed by Pltf
Mar 27		HEARING RE All Pending Motions was held before Loughlin, J. D. Bonila was the Reporter. Evidence was introduced.
	22	Record of Courtroom Minutes
	22½	Parties' Exhibit List
Apr 5	23	Pltf's Req for Findings of Fact and Rulings of Law RE Covenant Not to Sue
Apr 8	24	Defts' Add'l Reqs for Findings of Fact and Rulings of Law in Connection with Covenant Not to Sue Executed by Pltf
Apr 29	25	Order on Mot to Dis and/or Pet for Declaratory Judgmt (MFL) (EOD 4/29/85) cc attys Defts' mot to dis gr.
Apr 30	26	JUDGMENT (JRS) (EOD 4/30/85) cc attys
May 6	27	Pltf's Obj to Court Order Dtd 4/29/85 Dis Complt
15	28	Pltff's NOTICE OF APPEAL to CCA (cc: Attys) (EOD: 5/15/85) Desig. & Transcript ltr. w/ copy of docket to cnsl Desig. due: 6/4/85 $70.00 Appeal fee Rec'd recpt # 5382 $5.00 Clerk fee, $65.00 CCA
Jun 12	29	Pltff's Designation of Record and Items on Appeal
24	30	Clerk's Certificate to CCA (copy) (cc: Attys) (EOD: 6/24/85) w/ cert of dkt. File forwarded to CCA on appeal w/ cert copy of dkt. Reg. Mail

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1508

BERNARD E. RUMERY, JR.,
PLAINTIFF, APPELLANT,

v.

TOWN OF NEWTON, Etc., Et Al.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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NO. BELOW: CA: 84-02791
JUDGE BELOW: Loughlin, J.
DATE OF JUDGMENT: April 30, 1985
NOTICE OF APPEAL FILED: May 15, 1985
[CIVIL RIGHTS]

DOCKET ENTRIES

DATE	FILINGS — PROCEEDINGS
1985	
July 5	Copy of notice on appeal and docket entries received and filed and case docketed. Record on appeal in one volume, received and filed. Notices mailed. (ns)
July 5	Transcript Order, re
July 10	Appearance of G. Wells Anderson, for the appellant, received and filed. Docketing statement, received and filed. (df)
July 15	Statement of issues and designation of contents of appendix, received and filed. (df)
July 19	Supplemental certificate of No. 31 (transcript of hearing dated 3/27/85 & an envelope, received and filed. (lb)
July 25	APPEARANCE OF Donald E. Gardner, Esquire, for David T. Barrett and the Town of Newton, NH, received and filed. (ar)
Aug. 5	Appearances of Brian T. McDonough and James S. Yakovakis, for the appellees, received and filed. (df)
Aug. 8	Brief and appendix for appellant, Bernard E. Rumery, Jr., received and filed. Notices mailed. (sb)
Aug. 9	Transcript order of court reporter received and filed. (lb)
Aug. 19	Motion filed, without objection. Order (Torruella, J.) enlarging time for appellees to file their brief to and including September 12, 1985. Notices mailed. (lb)
Sept. 12	Brief for appellees, received and filed. (sb)
Sept. 30	Assigned for hearing at the October 1985, session. (df)

DATE	FILINGS — PROCEEDINGS
1985	
Oct. 4	Appearance of Charles P. Bauer, Esq. for appellant received and filed
Oct. 8	Heard before Coffin, Breyer and Timbers, JJ (df)
Dec. 2	JUDGMENT: The judgment of the district court is reversed and the cause is remanded to the district court for further proceedings consistent with the opinion filed this day. Opinion of the Court by Timbers, J. Notices mailed. (ns)
Dec. 12	Verified and itemized bill of costs in favor of appellant, received and filed. (al)
Dec. 24	Mandate Issued. Copy filed. Taxation of costs filed. Original papers returned to the district court and notices mailed. (jn)
1986	
Mar. 10	Notice of filing petition for certiorari from Supreme Court. (No. 85-1449, February 28, 1986) received and filed. (lb)
Apr. 25	Order from the Supreme Court granting the petition for a writ of certiorari (April 21, 1986), received and filed. (ns)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

No. C.84-279-L

BERNARD E. RUMERY, JR.

v.

TOWN OF NEWTON, et al.

TRANSCRIPT OF HEARING BEFORE THE HONORABLE MARTIN F. LOUGHLIN

Wednesday, March 27, 1985
10:00 O'Clock, a.m.

Appearances:

For the Plaintiff: Hall, Morse, Gallagher & Anderson
G. Wells Anderson, Esq.
Charles P. Bauer, Esq.

For the Defendants: Devine, Millimet, Stahl & Branch
Donald E. Gardner, Esq.
James S. Yakovakis, Esq.

• • •

[3] STEPHEN J. C. WOODS
having been duly sworn, testified as follows:

• • •

[4] *Direct Examination*

(Questions by Mr. Gardner)

Q. Mr. Woods, would you tell us for the record what your occupation is? A. My occupation is attorney.

Q. And how do you—where do you presently practice? A. Well, presently I am the elected county attorney in Rockingham County, and have been since January 1st of this year.

Q. Now, in April, May and June of 1983 how did you —what was your practice? A. I was in the private practice of law in Exeter, New Hampshire, in a firm named Shaw and Woods located on 81 Water Street.

Q. What was the nature of your practice in 1983 in terms of specialty, if you will? A. Well, it was a general practice, but I would estimate that approximately 50 percent or more than 50 percent of my time was spent in criminal defense matters.

* * *

[8] Q. Do you have a recollection as to when the probable cause hearing was scheduled? A. In excess of a month thereafter.

Q. So it was more than a month before probable cause? A. Yes.

Q. Okay. Based—I take it you took a look at the complaint in conjunction with preparing to represent Mr. Rumery. A. I believe so, yes.

Q. And did you conduct any kind of an investigation into the basis for the complaint? A. Well, I suppose an investigation to some extent. Not a very extensive investigation.

I had a discussion with Mr. Rumery as to his understanding of the basis of the complaint, had an opportunity to read some newspaper articles which were further indicative. I did not contact Mary Deary.

I made an attempt to contact the police department, and in fact filed a motion for discovery. They were uncooperative and objected to, in writing to providing any—my recollection is—the file does not seem to have that motion in it, but my recollection was there was a written motion for discovery which was filed and there was a written [9] objection.

Q. Now, at some point you came to some understanding based on this background investigation, if you will, on your activities with regard to the basis for the complaint and the nature of the complaint; is that correct? A. Yes.

Q. And was it your intention to go through the probable cause hearing? Had you made that determination? A. I don't know whether I had actually made that determination or not. I think that in all probability if there had been a probable cause hearing it would have been my intention to go through it.

Q. Did you feel on the basis of what you saw and what you knew in May of 1983 that there was probable cause for bringing the complaint? A. Isn't that asking me to make a legal determination? An opinion?

Q. I suppose it may be. Let me ask you this. A. Can I rephrase your question and try to answer it?

Q. Sure. A. If the question were based upon that initial investigation did I think there was sufficient evidence for a district court justice to find probable cause, the answer would be yes.

[10] Q. Fine. Now, after meeting with Mr. Rumery, who did you first speak to relative to this matter from the State's point of view? A. The police chief of the Town of Newton.

Q. So you did speak to the chief? A. Yes.

Q. And subsequently did you deal with the chief relative to resolving the criminal matter? A. No.

Q. Who did you deal with? A. The Assistant County Attorney, Brian Graf.

Q. Now he was — Rockingham County; is that right? A. Yes.

Q. Now, why did you call the assistant county attorney if in fact there had not yet been an indictment? A. Basically based upon my knowledge of how the criminal justice system works in Rockingham County, which is to the effect that normally when the police arrest an individual for an alleged felony they immediately submit written reports of same to the county attorney's office so that the case can be prepared for Grand Jury.

Therefore, the Rockingham County Attorney's Office becomes aware of possible felony indictments very quickly.

[11] Since I had found the chief in Newton to be uncooperative based upon my telephone conversation with him, I thought it best to immediately go to where I thought the case would ultimately end up. Also based upon my assumption that if they did have a probable cause hearing a district court justice would find probable cause.

Q. So basically you were trying to short-circuit the system and get to the guy you were going to deal with in the end anyway. A. Yes.

Q. Now, let me back up again and ask you something relative to your meeting with Mr. Rumery. At your first meeting with Mr. Rumery did he mention to you his intention or desire to dispose of this criminal case and bring civil actions immediately thereafter? Or bring it thereafter? I don't want the word immediately to— A. Before I answer that am I assured that the attorney-client privilege has been waived for the purposes of this hearing?

* * *

[12] [By Mr. Gardner]: We would on behalf of Mr. Rumery waive the attorney-client privilege for the limited purpose of this hearing.

The Court: All right. Thank you.

Q. With that, can you tell me now whether Mr. Rumery at your first meeting with him mentioned his intention to pursue a civil action once the criminal matters were disposed of? A. I don't know as to whether or not I would go so far as to say that he mentioned an intention to pursue a civil action, but I can state that he was aware of the possibility of a civil action and that he mentioned the possibility of a civil action.

Q. Now, subsequently and on your first contact with Brian Graf is it not true that—well, let me stop there and ask you whether in fact you initiated that contact. A. I did.

* * *

[13] Q. When you first called County Attorney Graf what did you tell him? A. I'm not sure whether I called him or visited him in person. I think that I went into his offices in person.

Q. All right. And on that first meeting what did you say to him relative to this case? A. I believe I suggested to him that the State nol-pros the criminal charges against Mr. Rumery immediately and told him—I think that what I said is, "You had better nol-pros these charges, because we're going to win them and after that we're going to sue."

Q. And by that, by stating, "We're going to sue," you meant bring civil actions; is that correct? A. Yes.

Q. Now, at some point in your conversations with County Attorney Graf did the question of a covenant not to sue in return for dismissal of the prosecution [14] come up? A. Yes.

Q. And am I correct in understanding that you don't recall who first raised that question? A. I believe Mr. Graf did, but I can't say it with surety, so I think it's safe to say I don't have complete recollection.

* * *

Q. Let me ask you this. Which came first, your statement to Brian Graf that he'd better drop the case because if he doesn't your client was going to sue, or the [15] mention of the covenant not to sue? A. My statement came first.

Q. So you first, on behalf of your client, suggested there would be civil proceedings and thereafter the possibility of a covenant not to sue was raised. A. Yes.

* * *

[18] Q. All right. At some point, however, you did meet with Mr. Rumery, am I correct, and discussed with him the advisability of signing a covenant not to sue. A. Yes.

Q. And did you recommend to him that he sign one? A. Yes.

Q. And this discussion with Mr. Rumery, where did it take place? A. At my office.

Q. And was it prearranged that he was going to come in to discuss that specific matter? A. Yes.

Q. Why is it you didn't just discuss it with him over the phone? A. The reason I didn't discuss it with him over the

phone is because Mr. Rumery was emotionally distraught throughout this whole matter. I felt personally that he was not taking the criminal matter—well, if I can strike that. I don't want to say he wasn't taking it serious enough.

I personally thought that too much of Mr. Rumery's attention was directed to the possibility of a civil action rather than what I considered to be the immediate need, which was a resolution of the criminal [19] matter, and I felt that if I had merely spoken briefly to Mr. Rumery over the phone that he would have rejected the State's offer.

I intended to recommend it, and I felt that the possibility of Mr. Rumery being amenable to that recommendation would be greater if he had an opportunity to reflect upon it at some time with me so that we could sort of walk through the different possibilities that existed.

Q. And so as I understand it you met at your office. A. Yes.

Q. And the purpose of the meeting was to discuss the covenant not to sue. A. Yes.

Q. And was the covenant not to sue drafted by the time you met with Mr. Rumery? A. Yes.

Q. Who drafted it? A. I did.

Q. Had you presented that covenant to County Attorney Graf prior to meeting with Mr. Rumery? A. Yes.

Q. He had reviewed it in form, if you will? A. Yes.

Q. How long did your meeting with Mr. Rumery at your [20] office over the covenant not to sue take? A. My recollection is that it was less than an hour, but more than half an hour.

Q. Were you alone during that meeting? A. Yes.

* * *

Q. Did you discuss with him the pros and cons of signing the covenant? A. I think so.

MR. BAUER: I'm going to object, It's vague. I'm not clear on what pros and cons are, and I'm going to have to object on vagueness.

THE COURT: Why don't you just ask him what they discussed.

Q. What did you discuss during this half-hour to one-hour meeting from top to bottom? A. I'm tempted to say the pros and cons of signing the covenant.

[21] Q. I don't want to lead you. A. We discussed in detail the criminal justice system and my attitude towards it. And we discussed in less detail, substantially less detail, the potential civil actions which Mr. Rumery might have. And we discussed a balance between the two.

Q. Did you discuss what effect the signing of the covenant would have on the potential civil action? A. Yes.

Q. And what did you discuss in that regard? A. I told Mr. Rumery, whether it be true or not, I told Mr. Rumery that should he sign the covenant not to sue he would be foregoing all civil actions.

* * *

[24] BY MR. GARDNER: At the close of your meeting had you answered all of Mr. Rumery's stated questions regarding this matter? A. I think so.

Q. And what was his conclusion at the close of your meeting relative to whether he would sign the covenant or not? A. He made no conclusion. He wanted to think about it further.

* * *

[25] Q. Did he state whether he had continuing concerns about signing it? A. Yes.

Q. And what concerns did he express? A. Mr. Rumery felt that he had been wronged by the criminal justice system and he wished redress from the criminal justice system. And he was reluctant to have criminal charges dropped in exchange for surrendering his possibility of redress from the system which he felt had wronged him.

Q. When he left your office on the day of that meeting do you have an opinion with regard to whether he was well-informed regarding the effect that signing the covenant would have on the possibility of his bringing any type of a civil claim?

* * *

A. My opinion was Mr. Rumery knew, had a clear [26] understanding of the different options that were open to him at that time.

Q. Now I guess my question was, was he well-informed or do you have an opinion with regard to whether he was well-informed with regard to the effect that signing the covenant would have on the possibility of his bringing any type of a civil claim? A. Yes, I have an opinion.

Q. And what's your opinion with regard to that? A. I think that Mr. Rumery was under the impression that should he sign the covenant not to sue that he had no civil claim thereafter.

Q. Did you advise him whether in your opinion the covenant not to sue would be binding? A. I probably did not use the term binding in explaining to Mr. Rumery what I thought the effect of the covenant not to sue would be.

Q. Did you explain to him what you thought the effect of signing the covenant not to sue would be? A. Yes, yes.

Q. And what did you tell him? A. I told him—I think that what I told him is what resulted in his having the opinion which you previously asked; and that is, that should he sign it there would be no possibility of a criminal action. Excuse me, [27] of a civil action.

Q. Did you put any pressure on him to sign it? A. That's a question which I suppose an absolutely honest answer would be yes. Simply by virtue of making a recommendation, I think that that has to some extent a coercive effect upon someone who's not familiar with the criminal justice system.

So to the extent I made a recommendation and supported that recommendation I think that that would have the effect of putting some pressure—

Q. Other than to recommend it and supporting the recommendation, did you coerce him in any way? A. No.

Q. Did you pressure him in any way? A. Well, with the exception of those two facts.

Q. Right. A. No, I didn't pressure him.

Q. When he suggested that he wanted to think about it did you try to discourage him from doing that? A. (Brief pause.) I don't think so.

Q. Now, after he left your office when was the next time you talked to him? A. My best recollection it was about three days thereafter.

Q. And how did that conversation come about? [28] A. I called Mr. Rumery.

Q. And what was the purpose of your call? A. I wanted to ask him whether or not he'd had an opportunity to make a decision on whether or not to sign the covenant not to sue.

Q. And what did he advise you relative to his decision? A. I don't remember whether he advised me about his decision at that time or he said that he would call me back. So I'm not sure whether he spoke to me at that time or whether there was a subsequent telephone conversation approximately one day thereafter.

Q. When in fact he advised you of his decision what did he tell you about his decision? A. He told me that he had decided to sign it.

Q. And this was done over the phone. I mean, he told you over the phone he had decided to sign it? A. Yes.

Q. And did you make arrangements to have him come in and sign it? A. Yes.

Q. And did he sign it at your office? A. Yes.

Q. And did you witness his signature? A. Yes.

Q. And you acknowledged that it was his free and [29] knowing act? A. Yes.

* * *

Q. When he left your office on the day of your meeting did he take a copy of the covenant with him? A. I really don't recall these, you know, details like that. I would be very surprised if he was not provided with one, but I don't recall. I mean, that would be my normal practice to do so.

Q. In any event, did you have any doubt that he had an opportunity to read it and read it carefully before hm signed it? A. Oh, no. I am surm he must have taken a copy of it with him after the first conversation.

Whether or not he took a copy of the signed one I don't recall. Again, probably, because my practice is to spin out copies as if they're—

Q. Paper. A. Paper, yeah. Good choice of words. But I know he had a[t] least a copy of the document.

Q. All right. I guess what I'm trying to establish is whether or not—and I think you've already answered this—but whether or not when he left your office [30] after that first face-to-face meeting he left with a copy of the proposed covenant not to sue. A. To the best of my recollection he did.

Q. All right. A. It wouldn't have made sense for him to go and spend three days thinking about it unless he had the document to refer to.

Q. Let me show you a copy of the covenant not to sue, which was marked as Exhibit 1 for identification in your deposition. A. Yes.

Q. Is that in fact the covenant not to sue that you drafted? A. Yes.

MR. GARDNER: I'd offer it, your Honor.

MR. BAUER: No objection.

THE CLERK: Document is entered as Plaintiff's Exhibit 1. [Changed to Def. A at 33.]

Q. Would you take a look at that and tell me what the document—who the document identifies or what parties the document identifies as people that Mr. Rumery is covenanting with or entities that he's covenanting with? A. Mary A. Deary, the police department of the Town of Newton and the Town of Newton.

[31] Q. Does it make any mention of their legal representatives, heirs, assigns and everybody else? A. No.

Q. There's no clause in there that says he's covenanting with all these other folks? A. Oh, excuse me, yes. "This covenant shall inure to the benefit of the covenantees and their heirs, assigns, successors and legal representatives."

Q. Did you have an understanding at the time that you drafted that document with regard to who the legal representatives of the Town of Newton were? A. I suppose I had an understanding, but—

Q. What was your understanding? A. My understanding was that I put everybody in here as a covenantee that Attorney Brian Graf requested.

Q. And that's the only reason why they appear there? A. Basically, yes.

Q. Do you know why Mary Deary was listed as a covenantee? A. She was listed at the request of Attorney Brian Graf.

* * *

[36] Q. As a county attorney, do you feel it's important [37] to protect victims of sexual assault in order to preserve their testimony in the criminal case? A. I suppose that I wouldn't have to be a county attorney to respond yes to that question.

Q. That's why I asked it that way. Did you ever read Chief Barrett's report regarding the alleged telephone call received by—or the alleged telephone conversation between Mr. Rumery and Mary Deary? A. I don't think I ever did, no.

Q. Do you have any understanding regarding what was alleged, what it was alleged that Mr. Rumery had said to Mary Deary? A. Yes, I did then. I don't now.

Q. You don't have any recollection? A. No.

* * *

[39] *Cross-Examination*

(Questions by Mr. Bauer)

XQ. Mr. Woods, is it fair to say that a substantial amount of your practice back in 1983 was with regard to criminal defense work? A. Yes, sir.

XQ. And back in April, May and June of 1983 had you ever brought a federal complaint on behalf of a plaintiff? A. No.

XQ. Had you ever brought a 1983 action on behalf of a [40] plaintiff, either in federal or state court? A. No.

* * *

XQ. Mr. Woods, is it fair to say that 95 percent of your attention when representing Mr. Rumery was directed at the criminal defense aspect of the charge? A. Yes.

XQ. And that you were not concerned or you had very little concern for any potential civil matters. A. Well, yes. And that's because of my assumption that any civil action would basically be contingent upon a [41] successful outcome of the criminal matter.

XQ. Successful by way of a not guilty verdict? A. Yes.

XQ. Or by way of a nol-pros? A. One or the other.

XQ. And therefore your attention was to the criminal and not to the civil matter. A. Yes.

XQ. Now, when you first contacted Chief Barrett had you ever made any indication to him about a potential civil suit? A. No.

XQ. Do you know whether Attorney Graf ever talked to Chief Barrett about a potential civil suit? A. I have no knowledge.

XQ. And my understanding of your direct testimony is that you were not a hundred percent sure as to who brought up the issue of the covenant, but is it fair to say that it's more probable than not that Attorney Graf brought up the issue of the release rather than you initially bringing it up?

* * *

[42] A. Well, yes. In fact I would like to go perhaps one small step further than that and say I think he brought it up. I just don't recall. So it could have been me, but I think he did.

XQ. Fine. Now, in your dealings with Attorney Graf was it your understanding that the State would not nol-pros without the covenant not to sue? A. Yes.

XQ. If Mr. Rumery refused to sign the covenant would the State have continued in the criminal prosecution of Mr. Rumery? [43] A. Yes.

MR. GARDNER: Objection, your Honor. He can't know the answer to that question.

THE COURT: Well, why don't you ask him directly what conversation he had with Graf.

XQ. Did Mr. Graf, Attorney Graf, indicate to you that the State would continue with its criminal prosecution if Mr. Rumery did not sign the release? A. Yes, he did, but I'd like to explain the answer.

XQ. Sure. A. I don't think at any time Mr. Graf indicated that if Mr. Rumery didn't sign the release that they were going to have a probable cause hearing, an indictment, and proceed to trial. He just indicated that the criminal process would continue.

Whether it could have been, you know, interrupted at any point thereafter, I mean, there was no indication that it was—that Mr. Graf was therefore going to, you know, push this as far and as hard as he could.

* * *

[44] XQ. I'm going to show you a copy of a letter dated June 8th, 1983, and ask you whether you can identify that document. A. Yes. This is a copy of a letter which I addressed to the Clerk of the Plaistow District Court indicating that the State was nol-prossing the charge against Mr. Rumery and for that reason neither Mr. Rumery nor myself would be present for the probable cause hearing.

The reason I sent this letter is the matter was still technically in the district court. My negotiations were with Brian Graf in the County Attorney's Office.

I was concerned that the County Attorney's Office might not communicate to the district court the status of the case, so I did it myself so that the failure of Mr. Rumery and myself to appear on June 14th would not result in another warrant.

XQ. So on June 14th there was a probable cause hearing for Mr. Rumery. A. Yes.

XQ. And— A. And this letter is dated June 8th. And it no doubt was dictated by me. Whether it went out June 8th, I don't know. It could have gone out the day thereafter. [45] But it would have been dictated by me on the same day that Mr. Rumery signed the covenant not to sue.

XQ. So on June 8th it's more likely than not that Mr. Rumery signed the covenant and on June 14th he was facing the probable cause hearing. A. Yes.

MR. BAUER: Your Honor, I would ask that this June 8th, 1983 letter be marked as Plaintiff's 1.

MR. GARDNER: No objection, your Honor.

THE CLERK: The June 8, 1983 letter is marked and received as Plaintiff's 1.

XQ. Now, Mr. Woods, you have any understanding as to the reason the State wanted the release signed? Do you have any understanding? A. Yes.

XQ. And how did you obtain that understanding? Did you talk with Attorney Graf? A. No.

XQ. Do you know the reason for the release being a condition of the nol-pros? A. No. I have an understanding based upon the weight of the circumstances.

XQ. And what was your understanding?

* * *

[46] * * * My understanding was after I had made this threat of a civil action the State was not willing to enter the nol-pros—to enter a nol-pros at that time without a release from Mr. Rumery of those threatened civil actions.

XQ. And that was to protect the police department? A. To protect the police department and the witness.

* * *

[50] XQ. With regard to your dealings with Mr. Rumery, you never discussed the type of suit that Mr. Rumery may have against any individuals; did you? A. No.

XQ. You never discussed with Mr. Rumery the type of rights that he may have against individuals; did you? A. No.

XQ. You do not recall, do you, ever discussing any 1983 actions that Mr. Rumery might have or 1985 actions that Mr. Rumery might have against any individuals; did you? A. I don't recall. I may have mentioned a number of common law tort theories. I may have mentioned 1983. There was some conversation about civil actions. I certainly didn't go into detail concerning any of them about what the, what the elements of each action would be.

And so to the extent that there was any conversation between myself and Mr. Rumery about civil actions, I may have thrown out some words but it [51] was more—I am sure that it was more than an understanding that if a wrong was committed there would be some civil redress.

And the particular kind of civil redress was not of interest to me at that time, because I assumed that we would need to resolve the criminal matter successfully prior to seriously considering the civil action.

XQ. All right. So then you never really went over any details of any federal rights, or for that matter state rights, that Mr. Rumery may have had. A. Right, I did not.

XQ. And in fact your overriding concern, as a criminal defense lawyer, was to in one way or another clear Mr. Rumery of the criminal charge; isn't that correct? A. Yes.

XQ. And you had very little, if any, concern about potential civil suits. A. True.

XQ. Now, in your direct testimony you indicated that Mr. Rumery was in an emotional state. He was very distraught; wasn't he? A. Yes.

XQ. And he was very excitable throughout this whole [52] incident; wasn't he? A. Yes.

XQ. Do you know whether Mr. Rumery has ever been introduced to the criminal justice system before this incident? A. My understanding was that he had not.

XQ. Do you know what Mr. Rumery did for a living when he was arrested? A. My understanding was that he worked for the John Hancock Insurance Company. I think as an insurance salesman, but I'm not sure. My recollection as to exactly what his capacity for John Hancock was is sketchy.

XQ. Do you know whether he had any significant motor vehicle record? Do you have any information about that at all? A. I had, I had no information, but—well, I don't even—I certainly had no information about a motor vehicle record.

My recollection was that Mr. Rumery had never been arrested before.

XQ. And he was beside himself, wasn't he, throughout this whole incident? A. Yes.

XQ. And he was beside himself in this emotional state for [53] a number of reasons, one of which were certain newspaper reports that were published; isn't that correct? A. Yes.

XQ. And would you explain the impact, or what those newspaper reports were and the impact that you saw on Mr. Rumery. A. The newspaper reports were news articles in I believe four different newspapers, although each one was slightly different, which contained statements by the chief of police of Newton relative to the arrest of Mr. Rumery, which were I would have to state virtually condemnatory in nature.

XQ. Prior to a probable cause hearing. A. Yes.

XQ. And what effect, if any, did you observe those newspaper accounts having on Mr. Rumery's emotional state and mental state? A. Well, to the extent he was distraught after the arrest, these exacerbated his mental state.

He was a very difficult client to deal with, because he was—I don't want to say wild in a sort of a violent sense, but—I mean he was so excited about this, these, this arrest and these newspaper reports that it was hard to calm him down so that you could [54] talk to him about the details of the criminal justice system or the details of civil actions.

XQ. Was it confusing to you to deal with him in order to keep him on track in your talks with him? A. I don't think he was confusing to me. I mean, it was something that you really had to work at to keep him on track.

XQ. Now, in your direct testimony you indicated that you thought that probable cause would have been found by the district court. Would you explain your answer? A. I certainly don't want to cast any aspersions on the criminal justice system in the State of New Hampshire, but it has been my experience that the district court's really not designed for sophisticated fact-finding and that what amounts to probable cause is really possible cause in the district court.

If they find that there's a possibility that the named defendant committed an offense they will find probable cause, because the district justices are well aware of the fact that regardless of their finding that the case will be reviewed by the respective county attorneys around the state and that regardless of their finding the case will still be submitted to a Grand Jury for their finding.

So in fact there are very, very few probable [55] cause hearings anymore, because they're all scheduled after the next sitting of the Grand Jury so that the Grand Jury can take over that process. So it's kind of an additional process which is rarely used, and they know that there's going to be a Grand Jury investigation anyway, so the tendency of the district court justices is to always find probable cause.

XQ. Regardless of whether the evidence measures up to--measures up to textbook probable cause or not? A. That is my personal opinion.

XQ. And was that opinion given to Mr. Rumery? A. Yes.

* * *

[57] *Cross-Examination*

(Questions by Mr. Yakovakis)

XQ. Mr. Woods, I just want to clarify a few things. You indicated that Mr. Graf only indicated to you through your discussions that if the covenant had not been executed that the criminal justice system would merely take its ordinary course; is that correct? A. Yes.

XQ. He never indicated to you or advised you or said to you that if this covenant is not signed we're going to proceed in some, some way other than just a normal processing of the criminal action. [58] A. No.

XQ. And he never in any way put any pressure of any type on you to have that covenant not to sue executed by your client. A. No.

XQ. You, at the time that that covenant was signed you and your client had the option of going forward with the probable cause hearing and the normal course of a criminal hearing; is that correct? A. Yes.

* * *

[67] BERNARD E. RUMERY, JR.

having been duly sworn, testified as follows:

* * *

[68] *Direct Examination*

(Questions by Mr. Anderson)

Q. Mr. Rumery, can you state your occupation, please? A. I am a marketing representative for the John Hancock Companies.

Q. And where is your place of business? A. In Haverhill, Massachusetts.

Q. And how long have you lived in New Hampshire? A. All my life. Fifty-five years.

Q. And prior to May 11th, 1983 did you know Mary Deary? A. Yes, I did.

Q. And in what connection? How did you happen to know her? A. Her husband was killed in an accident and I took care of the death claim. But I also knew her as a friend before that through her husband.

Q. And about how long would you say you had known her prior to 1983? A. I'd say four or five years.

Q. And did you also know a man by the name of David Champay? A. Yes, I did.

[69] Q. And in what connection did you know him? A. I used to go hunting with him. Deer hunting.

Q. Did Mary Deary know David Champay? A. Yes, she did.

Q. Did they live in proximity to each other? A. I'd say around a mile apart.

Q. And they were to your knowledge social acquaintances? A. That's correct.

Q. Now, did you have occasion to call Mary Deary sometime in the spring of 1983? A. Yes, I did.

Q. And what was the occasion of your calling? A. I saw in the paper where David Champay had been arrested for, I think it's felonious sexual assault or something like that. It may be rape, whatever. And knowing Mary, I called her to find out who the woman, the victim was.

Q. And what did she tell you? A. At first she was very indignant to me and I couldn't understand what it was all about. I was just asking her a question. Well, finally she told me she was the victim.

Q. And was that your first knowledge that she was the victim in the case? A. That's correct.

[70] Q. Before calling Mary Deary had you had any conversation with David Champay about calling Mary Deary? A. No, I haven't seen Dave since last November.

Q. Well, as of the time—you mean the fall of '82? A. That's right.

Q. After you found out that she was the victim, did you have any further conversation with her at that time? A. Not too much. There wasn't too much. I can't—

Q. When did that conversation take place? A. Where did it take place?

Q. When, about. A. I'd say around, guessing around March, the first part of March, somewhere along in that line.

Q. Would it have been some time after the indictment came out in the paper? A. Oh, yes, it was, because I didn't know anything about it until it came out in the paper.

Q. From the time of the telephone conversation how long a time elapsed approximately until you had another telephone conversation with her? A. Around two months.

Q. And in the interim did you see or talk with her? A. No, I didn't.

Q. And how did this next telephone conversation occur? [71] Who called whom? A. She called me at my office.

Q. And about when was that? A. I think it was May 11th. Could have been May 10th. 10th or 11th.

Q. And she called you you say. A. That's correct.

Q. At your office. A. Right.

Q. And what was the reason given by her for the call? A. She wanted to know whether I knew of Brenda George.

Q. And why did she want to know that? A. Brenda George was going to marry her son and I was a friend of the Georges.

Q. And why did she— A. And she wanted to know what type of a girl she was.

Q. After that conversation on that subject was any other subject brought up? A. Yes. She asked me if I knew that Dave Champay's wife had left him and I says no, I didn't.

Q. What else did she say? A. And she says, she said, "Well, I didn't want"—she says, "David is a victim. I like David and he's the victim."

She says, "I don't—I don't understand," she [72] says. "He has to give her—which means his wife, Diane—money.

Her boyfriend's giving her money. The only money I'm getting is from John Hancock," which means it was an investment she got I sold her.

And she says, "He is the victim." She says, "I feel sorry for him." But she says—

MR. YAKOVAKIS: Your Honor, this is all hearsay and I object to it.

MR. ANDERSON: I'm not offering it for the truth of the matter, your Honor. I'm offering it for the state of mind of my client—

THE COURT: I'll let it in on that basis.

A. And so she said she didn't know—she says, "I don't know what to do. I don't want to hurt him." She says, "I don't know what to do."

So I said, "Well, if you feel that way towards him," I says, "then you can—it's possible to, to end this case." I didn't say end the case. I says, "It's possible to stop the case," or whatever. And she says, "Well, I was told I couldn't."

And I says, "Well, you can call the county attorney if you want and talk to them about it."

But she kept saying she was—she kept saying—well, she says, "I'm not a bad person, I'm not vindictive."

[73] And I says, "Well, that's up to you." I said, "That's all I can say."

And I says,—she kept rambling on about different things and finally I says, "Look, Mary, I have to leave. I have an appointment. If you want to call me I'll be in the office 11 o'clock tomorrow morning."

And that's all there was to the telephone conversation.

Q. At some time after that telephone conversation were you arrested? A. The next day.

Q. And who arrested you? A. Chief David Barrett.

Q. And was anybody else with him besides— A. Officer Farrell.

Q. And explain to the Court the circumstances under which you were arrested. Where were you? A. I was at home.

Q. And did you have any forewarning of this arrest? A. Yes. Yes, I did.

Well, not for the arrest. I didn't know what it was all about. The police come to my house while—when I was gone, talked to my wife. And they told my wife to call Rockingham County dispatch office or [74] call them when I got home.

So I did. And I told them—and I asked them what they wanted. They said, "We want you down here right away."

I said, "No, no. If you want to see me, you know where I live." And so—

Q. Then what happened? After that what happened? A. So they arrived around 10:30 at night. And they walked in and I said, "You must be the new chief of police in Newton." I don't know whether he even answered me or not.

Q. What did he say? A. And I says, "Well, what can I do for you?" And in the meantime I says, "Have a seat," and he says, "I'd rather stand."

And I says—he says, "Do you know a Mary Deary?" And I says, "Yes."

And then he started to—he proceeded to read my rights to me.

Q. And then what happened? A. And then he just said, "You are being arrested for a Class B felony," under certain RSA number, tampering with a witness, which is a—which is a felony, Class B felony.

And I said, "What's—I says, "What am I being [75] arrested for?"

And he says, "You threatened her life," and harassed somebody or something.

Q. At that point in time did you know who he was talking about? A. No, I didn't.

Q. Did he tell you anything other than that? A. No.

Q. Then what happened? A. About that time I called my wife. She was setting in the other room and I called my wife and I told her. I says, "Come out here," and she overheard the coversation.

She said, "Don't tell them anything and don't say anything," or something to that effect.

And I says, "Well, I want Danny Lenehan. I want the State in on this."

Q. Who is Danny Lenehan? A. He is a State Trooper that lived down the street from me.

Q. At this point in time did you have any prior criminal record of any kind? A. No, I didn't.

Q. Motor vehicle record? A. I never even got a parking ticket in my life.

[76] Q. So was this your first contact with the criminal system? A. Yes, it was.

Q. What did they do next after that? A. He took me to—he handcuffed me and—oh, first of all, then I called Danny Lenehan and Danny told me to do what they required and to get myself a lawyer.

So they handcuffed me and took me out into the cruiser, took me to Brentwood.

Q. How did you get—find your way to Brentwood? A. I showed them how to get there.

Q. They didn't know how to get there? A. No, they didn't.

Q. Anyway, did they interrogate you at all and ask you questions about the crime or anything like that? A. They never mentioned a thing.

Q. When they got to Brentwood what did they do? A. Well, I went in, set down on a bench handcuffed and the jailer—I'm setting there for a few minutes and the jailer comes up and grabs the keys off of Barrett's person and he says, "Give me those keys," and he come over and he released me.

Q. Is this anybody you knew? A. The jailer? No, no. In fact I can't even remember [77] his name now.

Q. Then what happened? A. Then Barrett come up and shook his finger at me and he says, "I don't want you near her house and harassing her and threatening her," and all this bit. He rambled on and on about it screaming at me. And then he left.

Q. What did you do after that? A. Went through the procedure. I was mug shot, I had my mug shots, my fingerprints, and proceeded through the bail, whatever bail, I mean whatever I had to do. They had to call a bailiff. I bailed myself out.

Q. And how did you get back from Brentwood— A. My wife, she came and got me.

Q. Is that the same night? A. Same night.

Q. Now, have you had an opportunity to review the police report which has been marked as an exhibit? I will represent to you it has been marked as an exhibit in this case. A. Yes, I have.

Q. And in it there are certain statements which are related as having been made by you in the course of your telephone conversation with Mary Deary; is [78] that correct? A. That is correct.

Q. And I'm going to call your attention to page two of the police report where it's in single space and ask you if you said that, made the statement that David Champay would have the best lawyer that money could buy. A. I see this. I see it here, right.

Q. Did you make that statement to Mary Deary? A. I did not.

Q. What about that when the case gets to court the lawyer's going to nail her, Mary, to the wall. A. Absolutely not.

Q. And that her reputation will be ruined. A. No.

Q. And that you referred to Officer Kathleen Marino as Officer Maglino. A. No, I didn't.

Q. Did you even know of Officer Marino? A. No, I didn't know her.

Q. At that time. A. That's right.

Q. That the information would make her look like a fool in court. Did you say that? A. No, I didn't.

[79] Q. That Officer Marino's reputation would be ruined. A. No.

Q. That the writer's name would be mud in the Town of Newton. A. No, I didn't.

Q. Presumably referring to Officer Marino.

That if Mary Deary testified she and her daughter would end up like the two women in Brockton.

Did you make any such statement? A. I never knew anything about that at all. Nothing whatsoever. I never even knew that existed.

MR. ANDERSON: And for the Court's information, there is an apparent reference to a double shooting last week where two women were shot dead and the alleged killer was the father of the baby of one of them. And he took the baby, disappeared and is still at large.

Q. You did not know about that— A. No, I didn't.

Q. —at the time you were arrested? A. Nothing.

Q. Did you state that Deary had better not go forward with the case; that he, someone had gotten Ron Silver off on his rape case. Did you make that statement? [80] A. I did not.

Q. And that he could do the same in this case? A. That is false.

Q. And did you give her an ultimatum until May 12th, 1983 at 11 o'clock to think it over? A. No, I told her if she wanted to call me that she could call me at 11 o'clock. I'd be in the office at 11 o'clock the next morning. But I didn't give her any ultimatum or anything like that.

Q. Now, did you retain a lawyer after this? A. Yes, I did.

Q. And who did you go to first? A. To Robert Shaw.

Q. And why did you go see him? A. Because I had dealings with him before.

Q. And what did he do when you talked with him? A. He transferred me over to Stephen Woods.

Q. And did you have a conference with Mr. Woods? A. That's correct.

Q. And where was the conference held? A. In his office.

Q. And about approximately when would you say that this first meeting took place? A. I'd say the 13th of May.

Q. And did you tell him what had happened? [81] A. I did.

Q. And give him a statement? A. I did.

Q. And what did he say to you? A. He said he was going to make me ten foot tall.

Q. What did you understand him to mean by that? A. Well, in other words, he says, "I can"—he says, "Honestly and truthfully," he says, "I have defended a lot of people and usually they've been down the road before they come to me. But," he says, "in this case," he says, "I believe you a hundred percent. I think you are the only innocent person that I've ever defended."

Q. Then after that initial conference when was the next time that you talked with him? A. I can't remember. I called him a couple times to find out how it was coming. How the case was—whether he had heard anything or what was progressing.

Q. When was the first time that you heard from him on the subject of this release, of the covenant? A. Well, it was on a Friday about two weeks later.

Q. About what time of the day? A. Four o'clock in the afternoon.

Q. And what did he tell you? A. He said he could get me off. It was the first time [82] I'd heard about a covenant not to sue. I didn't know such a thing existed. And he called me at four o'clock and said I would have to sign this covenant and it would be all over.

Q. How much time did he give you when he initially called you? A. One hour.

Q. So you were supposed to call him back within an hour? A. Yes.

Q. And what did you say? A. I said "I can't do that. I just can't do that. I've got to have more time to think it over."

Q. What did he tell you would happen if you didn't sign it? A. In that conversation he didn't say. He might have, but—we would have to proceed and all this but—

Q. Did you have a conversation with him the next day? A. The next day.

Q. That was a Saturday? A. That's right. That's correct.

Q. Did you go into his office or was it on the telephone? A. No, this was on the telephone too.

Q. At that time what did he say? A. We went all over it again and everything and he told me that—my wife was on the other extension, too, [83] by the way. And he told me that he would advise me to do it.

And I says, "Well, what are my chances, you know, of going through with it?"

And he says, "Well," he says, "I can't tell you, but I can say that you wouldn't be the first innocent person who ever went to jail."

Q. And what effect did that have on your state of mind? A. A lot, believe me.

Q. And at some point did you sign this release? A. Yes, the next Monday. Oh, yes, another thing too. He said that if I didn't sign the covenant not to sue I would be indicted in the Grand Jury Monday morning.

Q. And what did you say to that? A. I didn't say anything. I just thought.

Q. And did you in fact go into his office on Monday? A. I did.

Q. And did you in fact sign that covenant not to sue? A. I did.

Q. And why did you sign it? A. Because I was afraid of going to jail.

Q. Did you feel at the time that you signed this covenant that you were guilty of the crime with which you had been charged?

[84] MR. YAKOVAKIS: Note my objection.

A. No way.

THE COURT: I'm going to allow him to answer. I'll note your objection.

Q. You may answer. A. No way.

* * *

[85] *Cross-Examination*

(Questions by Mr. Yakovakis)

XQ. Mr. Rumery, how old are you, sir? A. I'm 55 years old.

XQ. And how long have you been in the insurance business? A. Be six years April 2nd. Six years April 2nd.

XQ. Now when you—what do you do; sell insurance for Metropolitan? A. John Hancock.

XQ. John Hancock? A. Right. Insurance and investment vehicles.

XQ. And investments? What do you mean by those? A. Annuities, mutual funds.

XQ. And your office is in Haverhill, Massachusetts? A. 350 Main Street. 350 Main Street.

XQ. What did you do prior to being in the insurance business? A. I owned and operated a restaurant.

XQ. Where did you own and operate that? A. On Route 125, Plaistow, New Hampshire.

XQ. And how long did you do that, sir? A. Eleven years.

[86] XQ. Did you have any training in your insurance product before you went into the business of selling insurance? A. I had to pass the state examinations.

XQ. You did. Did you take some courses with the John Hancock? A. Well, at first. The courses didn't come at

all—I didn't—I had to pass the regular life and accident health that I self-studied.

Then I got with the National Association of Security Dealers. Then I had to go to school to study, because it was federal and I was handling securities and I had to do it that way.

XQ. Well, during that time you had to learn your product before you could sell it; did you not? A. Correct.

XQ. In other words, if you were selling insurance you had to be able to describe and advise your clients what they were purchasing and what the product was all about. A. Exactly.

XQ. Did you know Police Chief Barrett prior to any of this, this event? Prior to being arrested? A. No I didn't.

XQ. Did you know Officer Farrell before being arrested? A. No, I didn't.

[87] XQ. Did you know Officer Marino before being arrested? A. No, I didn't.

XQ. These three officers were police officers in the Town of Newton; am I correct? A. That is correct.

XQ. And you lived in the Town of Danville? A. That is correct.

XQ. Not in the Town of Newton? A. Right.

XQ. Who was the chief of police in Danville? A. Clyde Goldthwaite.

XQ. Now, I assume also you had no contact with any of the selectmen of the Town of Newton prior to your arrest. A. That's correct.

XQ. You had no prior problems with the police in the Town of Newton prior to this arrest. A. That's correct.

XQ. You did know Mary Deary. A. I did.

XQ. In fact you were a close friend of Mary's, were you not, and her husband? A. I was, that's correct.

XQ. And you and your wife had been out to dinner with them on occasion? A. Possibly. I can't remember that. I know we've been [88] to parties together.

XQ. All right. And that was the same, was it not, with David Champay and his wife. A. No, I wasn't as close to David.

XQ. You weren't as close to David, but you had been to parties with him and his wife; had you not? A. No, I hadn't.

XQ. You hadn't? He was just a hunting associate? A. That's correct. Once a year.

XQ. That's it. Now he lived in, he lived in Newton; did he not? A. That's correct.

XQ. Am I correct that I understand that you learned about the arrest of Mr. Champay by reading it in the paper? A. That's correct.

XQ. What paper was that? A. The Haverhill Gazette.

XQ. Haverhill Gazette? Did you call Dave Champay and ask him about it at all? A. No, I didn't.

XQ. Never discussed the situation with him whatsoever? A. None whatsoever.

XQ. Just one day you happened to be calling or talking to Mary Deary about that incident? You called her you [89] said; isn't that correct? A. That's correct, right.

XQ. Because you knew that she knew David Champay. A. I never associated the two of them at that time.

XQ. Oh, I see. Well, why was it that you asked Mary about this sexual assault that had occurred? A. Because she was a friend of mine.

XQ. But you didn't know she was involved at the time. A. That's exactly correct.

XQ. You just happened to be, what, discussing that issue with her? A. No, I called her to ask her who this person was that he was being—I mean Dave was being accused of, if she knew who this person was.

XQ. I see. Why was it that you thought Mary Deary would know this? A. Well, she lives in the same town.

XQ. I see. Well, there's a lot of people that live in Newton. A. Newton is small.

XQ. But Mary, for some reason you thought Mary might know. A. That's correct.

XQ. And in fact she not only knew, but she had been the victim; is that right? [90] A. That's correct.

XQ. And she was a little upset by it? A. That's correct.

XQ. But you didn't know that when you called. A. That's correct.

XQ. Did you know Ron Silver? A. Yeah, I did.

XQ And who was Ron Silver? A. He's a good friend of mine.

XQ. What does he do? A. He's a machinist. Welder, machinist, whatever.

XQ. Where does he live? A. Brentwood.

XQ. In Brentwood? He's a close friend of yours; isn't he? A. That's correct.

XQ. Why wasn't it that you didn't call Ron Silver to find out about David Champay? Or did you call him? A. Number one, he doesn't have a telephone.

XQ. Oh. A. Number two, he wouldn't have known anyway I don't believe.

XQ. I see. Okay. So rather than call him you called, thought to call Mary.

Now, when Mary Deary called you to talk about [91] Brenda George apparently you said she raised the issue of about not wanting to hurt Mr. Champay. A. That's right.

XQ. Now Mr. Champay, mind you, he was the one that had so feloniously assaulted and raped Mary Deary; am I correct? A. That's correct.

XQ. Now, this conversation took place some time after the original one, or was it the same time that you called her to talk to her about who the victim had been. A. Two months later.

XQ. About two months later? A. Right.

XQ. And she just, she called you and just asked you—told you that she didn't want to hurt Mr. Champay.

What else did she say? What was the purpose of that call? A. She wanted to find out if I knew of Brenda George.

XQ. Who? A. Brenda George.

XQ. Okay. A. Because Brenda George, whoever Brenda George is, was supposedly going to marry her son.

XQ. Okay. So after you finished discussing that, then you got on the issue again of Mr. Champay. [92] A. Yes, she did.

XQ. She got on that issue. And you didn't want to discuss that issue at all with her? A. I went along with it.

XQ. What do you mean when you say you went along—A. I answered her. Whatever she said, I answered her.

XQ. And then you told her, well, you've had enough, you were busy, and please call me tomorrow morning; is that right? A. That's correct.

XQ. At 11 o'clock? A. I said if she wanted to she could.

XQ. Where did you want her to call you; at home or in the office? A. No, I was going to be in the office.

XQ. Saturday morning? A. Saturday morning?

XQ. What day was that? A. Oh, I don't know.

XQ. But you wanted her to call you the next morning at 11 o'clock. A. I said she could call me if she wanted to.

XQ. Apparently she never did; is that right? A. That's correct, because I was arrested that day.

XQ. Did you have any, was there any—apparently you and [93] Mary were getting along all right; weren't you? A. That's right.

XQ. You had had no problems with her of any type? A. No problems whatsoever.

XQ. Was there any reason that you know of why Mary Deary would make the statements that she made to the police? A. Absolutely not.

* * *

[95] XQ. In any case, apparently you were arrested on May 11th; was it? A. May 11th.

XQ. And you went over and you talked the situation over with Bob Shaw and—is it Bob Shaw? A. That's right. Next day.

XQ. And he referred you to Attorney Woods. And Attorney Woods represented you.

Now, are you telling us that you never heard from Attorney Wood until he called you on a Friday and said he had a covenant not to sue for you to sign? A. Am I telling you that?

XQ. Yeah. A. No.

[96] XQ. Had you been to—and talked to Attorney Woods prior to that occasion? A. I'd called him on the phone. Two or three times.

XQ. Two or three times. Had you been to his office? A. Only the first time.

XQ. Only the very first time. A. Right.

XQ. And after that you only dealt with him by telephone? A. That's correct.

XQ. Did you ever have in your possession a copy of the covenant not to sue? A. Before or after I signed it?

XQ. Before you signed it. A. No, I never did.

XQ. You never looked at it, never saw it? A. Never seen it, no way.

XQ. So you went into his office and you signed it in his office without having seen it before. A. That's correct.

XQ. So when Attorney Woods testified here in court his recollection was not correct. A. That's correct.

XQ. When you talked to Attorney Woods and he called you, Mr. Rumery, to discuss the covenant not to sue did he explain what this was to you? [97] A. Vaguely.

XQ. Tell me what he said vaguely. A. He said, I believe he said—I can't recall, but I believe he said, "I can get you off of this," or something to that effect by signing a release, which I never even heard of. "But I have to know right away, because you're going to be indicted in the Grand Jury Monday morning." So one way or the other.

XQ. You had never heard of a release? A. No.

XQ. In the insurance business you'd never heard of a release before? A. That's correct. That's the insurance business. This isn't the law.

XQ. You never heard of what a release was at all? A. A covenant not to sue? That's what it is.

XQ. Oh, I see. A. Well, that's what—

XQ. Did you read this document? A. Yes.

XQ. Covenant not to sue? A. Before I signed it I did.

XQ. Yes. Did you read it? A. I read it.

[98] XQ. Did you understand it? A. Partially.

XQ. Well, what part didn't you understand? A. I can't recall right now.

XQ. Did you discuss any portions of it with Attorney Woods? A. I don't think so.

XQ. You mean even the parts you didn't understand you didn't discuss with Attorney Woods? A. That's correct.

XQ. You had no concern over those, Mr. Rumery? A. Oh, I had concerns, but I was in a mental condition at that time, it didn't make any difference. All I knew was I was going to jail.

XQ. I see. How about Attorney Shaw was still in the same building, wasn't he, with Attorney Woods? A. Yes.

XQ. And he was a good friend of yours. A. That's right.

XQ. You could have gone upstairs and talked to Bob Shaw and said: Hey, wait a minute. You know, I'd like—would you take a look at this agreement? Should I sign this Bob, or shouldn't I? Did you do that? A. No, I didn't.

XQ. Why didn't you do that? [99] A. I don't know.

XQ. You don't know. You were told by Attorney Woods I gather that on Friday, which would have been, what, the 3rd of June if Monday's the 6th? A. I believe somewhere, probably.

XQ. You were told that on Monday the 6th you were going to be indicted if you didn't sign this covenant. A. That's correct.

XQ. Those are the words he used. A. Yes.

XQ. And did he explain to you what he meant by indictment? A. I was going to be indicted in the Grand Jury.

XQ. I see. Had you—is this the first time you had heard that? A. Yes, yes.

XQ. And this was going to be Monday, the following Monday, the 6th. A. Correct.

XQ. And he, initially when he called you at four o'clock it was late afternoon on Friday as I recall; right? A. Right.

XQ. And he said he wanted you to sign this document within an hour. A. He said he wanted an answer within an hour.

XQ. Answer within an hour. And you told him then: No way [100] I can give it to you. A. Correct.

XQ. Did you tell him: I want to see this document and read it? A. I might have. I might have.

XQ. You might have? A. I probably did. I can't—that's two years ago. I can't remember.

XQ. Oh, you can't remember? Do you remember going to his office afterwards to pick a copy up and taking it with you? A. The day I signed it.

XQ. The day you signed it. Not Friday. You didn't go by his office on Friday? A. No, no way. No.

XQ. And you didn't pick up a copy to take home to discuss and read. A. No.

XQ. You're not saying, apparently you're not saying you didn't understand the covenant; are you? You're not saying you didn't understand what was in this document when you signed it. Are you saying that? A. I might have understood most of it. I don't—at that time I just didn't—I wanted to get rid of it.

[101] Q. I see. Well, that's a different case.

Now, you say you may have understood what was in it, but you were in such a state of mind that you wanted to get rid of it regardless; is that correct? A. Correct.

XQ. That's what you're saying. A. That's right.

XQ. But that's different from not understanding what was in the document; am I right? A. I still don't understand it.

XQ. You still don't understand it? A. Right.

XQ. Well, why don't we go over it just a little bit and then you can tell me what you don't understand in this.

* * *

Do you know who covenantor and covenantee is? A. Well, I'm one of them.

XQ. Okay. Are you the covenantor? [102] A. I think so, yeah.

XQ. Okay. "Covenantor will never institute any action or suit at law or in equity against the covenantee."

Do you know what that means? A. Right.

XQ. You won't institute any suit against them? A. Right, right.

XQ. "Nor institute, prosecute or in any way aid in the institution or prosecution of any claim, demand, action or cause of action."

Do you understand what that means? A. I understand that, right.

XQ. Well, you knew, did you not, when you got through, before signing this document that you were releasing your right to sue the people named in this document through any civil action. Didn't you know that? A. The possibility I did. I don't even know. At that time I didn't know much of anything. I was in shock.

XQ. Now, this was on June 6th. This was almost a month later? A. About two weeks later I believe.

XQ. Well, you were arrested on May 11th? A. I was arrested on May 11th, but that was—the covenant was signed on when; June 6th?

XQ. June 6th. [103] A. Two, three weeks, whatever it might be.

XQ. You continued to work; did you not? A. No, I didn't.

XQ. You didn't work during that period? A. Very, very little, if anything at all. I don't think I did at all.

XQ. So when Mr. Woods had testified in this courtroom just a couple of hours ago that he explained this document to you and you understood it, that's not accurate? A. No, it isn't.

XQ. It is not accurate? A. It isn't accurate.

XQ. Is there any reason for Mr. Wood not to tell the truth as he recalled it? A. No, no. He just gave it to me and I read it and I says, "All right. I'll do it."

XQ. And that was the extent of it. A. That was the extent of it.

XQ. He never explained it to you? A. Well, he must have figured it was self-explanatory.

* * *

[104] *Cross-Examination*

(Questions by Mr. Gardner)

XQ. As I understand it you got a call from Steve Woods on Friday, June 3rd, 1983 at four o'clock. A. That is correct.

XQ. And you were at home or at work? A. At home.

XQ. He needed an answer within an hour. A. Correct.

XQ. And you told him when he called you at four that you couldn't possibly do that. A. That is correct.

XQ. That you wanted to think about it. A. Right.

XQ. You then knew, I take it, when he called you on Friday at four what the significance of the document he wanted you to sign was. A. Possibly.

XQ. Well, look. I mean, if you got to think about it you got to know what it is you're thinking about. A. It was a release he said. A release.

XQ. And you understood what that meant. A. Not really. Not really at that time. I didn't, not in that conversation.

I knew I was getting off—he said he was going [105] to get me off, that's all. I didn't know what it entailed.

XQ. And did you speak to Steve Woods again on Friday after that telephone conversation? A. Friday after the Friday he talked to me?

XQ. On Friday, June 3rd, did you talk to him on that day again? A. No.

XQ. Okay. Was it left with him that you were going to call him back at some point? A. The next day. By five o'clock Saturday.

XQ. All right. So then you called him on the next day? A. That's correct.

XQ. But you did not meet him face to face. A. That's correct.

XQ. You did not go into his office. A. No, I didn't.

XQ. And to the extent that he testified that you were in his office and had a one-half hour to one-hour conference to discuss this he is in error. A. That is correct.

XQ. You did not get a copy of the covenant to take with you to look at, think about, prior to deciding to sign it? A. I said I wasn't even there.

[106] XQ. So that to the extent he said that was the case, he was in error again. A. That's correct.

XQ. When you talked to him on the phone on Saturday did you tell him that—any time during that conversation that, yes, in fact you were willing to sign it? A. Near the end of the conversation I think I said, "I think I'll sign it."

XQ. And when did you go in to sign it? A. Monday night.

XQ. Were you indicted by the Grand Jury on Monday morning. A. No, because he said he would stop it.

* * *

[DEF. TRIAL EXHIBIT C]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

[CAPTION OMITTED]

DEPOSITION OF BRIAN ROSS GRAF

Deposition taken by agreement of counsel at the Rockingham County Administration & Justice Building, Exeter, New Hampshire, on Friday, March 22, 1985, commencing at 9:03 a.m.

* * *

[3] APPEARANCES:

For the Plaintiff:	HALL, MORSE, GALLAGHER & ANDERSON By: G. Wells Anderson, Esq. 14 Centre Street Concord, NH 03301
For the Defendants Town of Newton & Selectmen	JAMES S. YAKOVAKIS, P.A. By: James S. Yakovakis, Esq. 67 Central Street Manchester, NH 03101
For the Defendants Chief Barrett & Town of Newton	DEVINE, MILLIMET, STAHL & BRANCH, P.A. By: Donald E. Gardner, Esq. 1850 Elm Street Manchester, NH 03105

* * *

[4] BRIAN ROSS GRAF

having first been duly sworn by Mr. Yakovakis, was deposed and testified as follows:

Examination

BY MR. YAKOVAKIS:

Q. What is your name? A. Brian Ross Graf, G R A F.

Q. Where do you reside? A. Seven Wayside Drive, Exeter.

Q. And what is your occupation? A. I'm Deputy County Attorney for Rockingham County.

Q. How long have you served in that capacity? A. I have been an assistant in the Rockingham County Attorney's office for approximately four and one-half years, and I have been officially the deputy since, I think, January of 1985, but I have been unofficially the first assistant for—well, since July of 1982 I believe.

* * *

[7] Q. All right. In the course of your—in your capacity as County Attorney's office, Rockingham County, you have had dealings with the Town of Newton and its police department? A. Yes, I have.

Q. And do you know Chief Barrett of the Newton Police Department? A. Yes, I do.

Q. Do you recall being involved in a case involving Mary Derrie (ph) and a Mr. Champy? A. I believe it's Mary Deary, D E A R Y, and I believe David Champy, C H A M P Y. I do recall that case.

Q. Can you just tell me briefly what that case involved? A. It involved an allegation that David Champy had committed an aggravated felonious sexual assault on Mary Deary.

Q. What was your first connection with that case if you recall? Who brought it to your attention and under what circumstances, etc.? A. I don't remember for sure how I became [8] involved with the case in the first instance. I do recall that I discussed the case with Chief Barrett, and I believe I may have also discussed the case with Kathleen Marino, although I don't remember for sure.

* * *

Q. Did you review that case for purposes of determining whether it had merit? A. Yes, I did.

Q. And what was your opinion? A. My opinion was that the case did have merit, although it was going to be primarily a situation where the state would have to rely upon the testimony of Mary Deary, the situation where she knew David Champy in the past, and there was some physical evidence in the form of photographs that had been taken of Mary Deary which were important from my point of view in determining that that [9] particular case had merit so it should be presented to a grand jury to determine if it warranted a trial.

Q. Did that case go to a grand jury? A. Yes, it did.

Q. And did the grand jury find probable cause? A. They indicted Mr. Champy.

Q. You have to excuse me, Mr. Graf, because my criminal terminology is kind of rather lacking.

At some point after the indictment of David Champy, did you get involved with another case involving, quote unquote, witness tampering with respect to Mary Deary? A. Yes, I did.

Q. Can you tell me, sir, what your involvement—when you first became involved in that particular matter? A. I don't recall the date, and I don't think I have any notes anywhere that would indicate when it was. But I do recall talking to Chief Barrett about it. I don't recall whether it was on the phone or if he had come into the office and talked to me. I met with Chief Barrett I would say [10] fairly frequently since the David Champy case had come about. There was a lot of work that was being done in that case, and that's why it is hard for me to remember whether it was on the phone or in the office we talked about the situation involving Mary Deary and Mr. Rumery.

At that time I recall Chief Barrett telling me about the phone calls which—or the phone conversation that Mary Deary had related to the police department that she had had

with Mr. Rumery, and I recall Chief Barrett being very concerned because he didn't know—and he didn't want to see any intimidation of Mary Deary that would prevent her in testifying in the David Champy case. And the information that he relayed to me was certainly information sufficient to cause concern, if it was true.

Q. Okay. Now, Mr. Graf, you had met yourself, had you not, with Mary Deary on occasions? A. Yes, I had.

Q. And you had met with her with reference to what case? A. The David Champy case.

[11] Q. And in that case, was she, of course, an essential witness? A. Yes. Without Mary Deary, I don't think we could have prosecuted Mr. Champy.

Q. Now, you indicated, and I don't want to—I am sorry for breaking the train of thought here, but you indicated that Chief Barrett had discussed with you certain information that had taken place in a telephone conversation.

Can you relate to me, if you would, briefly what that informatin was that you felt was of some concern as you indicated, if it in fact was true? A. First of all, I can't remember whether the first conversation with Chief Barrett about it was over the phone or in the office, or perhaps he called me and said I have something to talk to you about, or can I come down and talk to you in the office. I don't remember which way it actually occurred, and at that point in time I can't remember the substance of the allegations.

I do recall of the allegations were true they were serious. It was not something to be taken [12] lightly. From my point of view the problem in terms of prosecuting was to try to get some corroboration of these statements so that the State would not have to rely simply upon the uncorroborated testimony of Mary Deary. But I cannot recall the exact nature of the conversation that Chief Barrett had with me.

Q. Do you have a file on this matter? A. Yes, I do.

Q. And is this the file before you? A. Yes, it is.

Q. Do you have a copy of the police report in that matter? A. Yes, I do.

Q. Could you take that out please and make reference to it.

(Witness did as directed.)

Q. Does that police report refresh your recollection in any way with regard to the items that you indicated caused you some concern if true, and if so, could you just relate and highlight those items which you felt were of significant concern? A. I recall Chief Barrett telling me, and I again don't recall whether it was the first [13] conversation we had concerning the matter, or if it was a later conversation concerning the matter, but I do remember him telling me as indicated in the report that Mary Deary had reported to the Newton Police that Mr. Rumery had made statements to the effect that if she were to go forward on the David Champy case she might end up like the two women in Lowell, Massachusetts, I believe, and there was a reference in the report to an apparent murder of two women in Lowell, Massachusetts. I don't recall in fact two women were in fact murdered in Lowell. But I do recall that particular aspect of the so-called intimidation in particular.

* * *

[14] Q. Did you feel that based on what you had been told by Mr. Barrett that there was sufficient basis for probable cause? A. Well, in the first conversation that I had with him when he actually told me about the incident, yes, I felt that if what he was telling me was true there would in fact be probable cause for the charge of tampering with a witness.

The problem that I saw as a prosecutor is at that time I would have to rely strictly on the [15] testimony of Mary Deary because I don't believe there was any other independent evidence that had taken place.

* * *

Q. Okay. Did Mr. Barrett call you and advise you that an arrest had been made and give you reasons why? A. He advised me. Again I don't recall whether he called me or he came into the office, but he did advise me that he had arrested Mr. Rumery.

[16] I was a little bit surprised because I had hoped that we would be able to put something into effect where we might be able to get some independent evidence of the alleged tampering with a witness, so that it would not be a situation where the State had to rely exclusively on Mary Deary, and I recall Chief Barrett telling me that he felt the situation had gotten out of control to such an extent that he didn't know whether or not Mary Deary would be able to testify with respect to the David Champy matter because she was so upset about what was going on, and he felt he had to act. So that's why the arrest was made.

Q. Now, you indicated that you personally would have liked to have had some corroborating evidence by some—what in particular were you referring to? A. Well, I believe we had talked about it, and I know I had thought about it of trying to perhaps have a police officer listen in on a phone conversation, whether it be through picking up an extension at Mary Deary's residence, or perhaps through a wire tap, and I knew any type of wire tap [17] would have to be approved by the Attorney General's office.

I recall that I was—my best memory is I was pretty busy at that time and I didn't have a lot of time to devote to this particular matter, as much time as perhaps I would have liked because I probably would have contacted the Attorney General's office myself to see if they had any recommendations. I don't recall having done that. But that was one thing that I believe Chief Barrett and I discussed, but I know I thought about it. Because I was quite concerned that if the allegations were true that the situation needed to be stopped.

Q. What was your next connection with the Rumery matter? A. Well, I recall Chief Barrett advising me that Mr. Rumery had been arrested, and we discussed that. As I indicated, I was surprised at that point in time that he had been arrested. And then I believe the case was probably either scheduled or prepared to be scheduled for the grand jury.

* * *

[19] Q. Now, you apparently had some conversations with Brian—with Mr. Woods. And who is Mr. Woods? A. Stephen Woods. He at that time was representing Mr. Rumery.

Q. And what is Mr. Woods' capacity today? A. He is the County Attorney for Rockingham County.

Q. Can you tell me briefly what your conversations with Mr. Woods entailed to the best of your recollection? Take the first one if you recall it all that distinctly, but what your first conversation was with Mr. Woods and what that involved? A I don't even remember how many conversations there were with him. I don't remember if there was one or really more than one concerning [20] this, but I recall that we had a conversation concerning a solution to this case in which it was discussed that the State would be willing to drop the prosecution of Mr. Rumery for the witness tampering charge in exchange for Mr. Rumery signing a release indicating that he would not sue the parties involved in the particular case. I recall we had that conversation.

Q. Do you recall who broached the subject of suit against the town? Did Mr. Woods raise that issue with you or not? A. I don't remember. I have some memory that I probably discussed the issue of a potential suit by Mr. Rumery against the town with Chief Barrett. I don't recall between Mr. Woods and myself who brought up the subject of the release or possible lawsuit, whichever way you want to look at it.

Q. In your discussions with Mr. Woods with regard to resolutions to this matter by way of your dropping the witness tampering charges against Mr. Rumery in exchange for a covenant not to sue or a release, what considerations did you give with [21] regard—what were the considerations that you yourself and your thought process with regard to entering into this settlement agreement? A. I had been advised by Chief Barrett that Mary Deary did not want to testify against Mr. Rumery. The witness tampering charge would have required Mary Deary to testify. She would have been the primary source of evidence against Mr. Rumery. There was still considerable concern about Mary Deary because the David Champy case was still pending.

I think that was a particular sensitive type of case where you are dealing with a victim of an alleged aggravated felonious sexual assault. And I think I was taking into consideration the fact that I had her as a victim of one case, and now, the State was in a position of perhaps having to force her to testify against her will perhaps causing more trauma or upset to her forcing her to go through more things than what I felt comfortable with doing. So that was one of the considerations I was taking into play at that time, that I had been informed that Mary Deary did not want to go forward with the [22] prosecution, that she felt she had gone through enough.

Q. So you did reach an agreement then with Steve—Attorney Woods? A. That's right. We discussed what I consider to be a common sense practical resolution to the problem, and that would be that the State would agree not to prosecute Mr. Rumery, and in exchange Mr. Rumery would agree that he would not sue anybody with respect to the case, and the matter would be put to rest for all parties.

Q. When you say the matter would be put to rest, you mean put to rest in all respects? A. Yes. With the exception that we were still continuing the prosecution of David Champy. And I don't believe that case had been resolved at that time.

Q. But with regard to anything with Mr. Rumery, all criminal charges were going to be disposed of, and any and all civil actions he might have would also be done away with? A. That's correct. When Mr. Rumery through his attorney agreed to that resolution of the [23] problem, and I received the covenant not to sue, the file that had been prepared for probable presentment to the grand jury was simply marked not presented and put in our closed file.

* * *

[25] Q. Did you ever meet or talk to Mr. Rumery yourself? A. I don't have any memory whatsoever of ever having seen Mr. Rumery. I'm virtually positive I never talked to him, and I don't have any memory of ever having seen him.

Q. Did you apply any pressure or anything of that nature on either Mr. Rumery or his counsel with regard to the execution of this particular covenant not to sue? A. No. I didn't. As a matter of fact, the situation was such I don't even recall who made the proposal with respect to this resolution of the [26] problem. All I can really recall at this date in time was that a proposal was made. It was a possible common sense resolution of the problem, and it was up to Mr. Rumery as to whether or not he wanted to accept this resolution.

Q. And you left that entirely between Mr. Rumery and his attorney? A. Yes, I did.

Q. But with respect to you and Stephen Woods at least, this was a common sense approach that you both agreed to and accepted? A. Well, I viewed it as a common sense approach. I really can't speak for Mr. Woods. I don't know exactly how he viewed it. But he presented it to his client, and his client signed the covenant not to sue, so I assume his client had accepted it and agreed to it.

Q. Had this agreement not been reached, Mr. Graf, you would have proceeded in the normal course with this Rumery case? A. I'm not sure what we would have done, because I didn't have to face that problem since the covenant was

executed by Mr. Rumery signed. [sic] The [27] State had to fulfill its end of the bargain. I don't know if we would have forced Mary Deary to testify through a grand jury subpoena if necessary because I didn't have to make that decision. But it was a possibility that certainly existed.

Q. For someone who is—doesn't understand the criminal procedure, are you indicating to me you could have forced Mary Deary to testify? A. If we could have subpoenaed her, we could have forced her to testify, yes. And I have every reason to believe we could have subpoenaed her.

Q. And what you are saying then is you don't know what decision you would have made under the circumstances when that decision ripened; is that correct? A. That's right.

* * *

[28] *Examination*

By Mr. Anderson:

* * *

[29] Q. Other than talking with Chief Barrett and possibly Officer Marino about this, these telephone conversations that allegedly occurred between Mr. [30] Rumery and Mary Deary, did you do any independent investigation of the evidence in that case? Or cause any investigation to be made by anybody else? A. I had discussed with Chief Barrett the desirability of trying to get some independent evidence that would not rely on Mary Deary exclusively to have to prove a tampering with a witness charge.

As I indicated previously, one of the things we discussed was perhaps having the police listen in on a phone conversation between Mary Deary and Mr. Rumery. I don't know how that phone conversation could come about, whether or not it would be legal to do that, whether or not a wire tap would be required.

I think one of the things also that I remember thinking about, I don't know if I discussed it with Chief Barrett or not, was whether or not there would be any possibility of getting any evidence from the company where Mr. Rumery was work-

ing. If my memory serves me correctly, he was some type of an insurance agent I believe and that's the reason—it was some type of a business [31] relationship between Mary Deary and Mr. Rumery that led to the call in the first place as I understand it, and I was wondering whether or not there would be any possibility of getting anybody from the company who could testify to any portions of the conversation. That as a practical matter probably would be wishful thinking, but it was something I thought maybe needed to be at least be discussed or considered.

* * *

[33] Q. Did you ever have any conversations with any of the Selectmen of the Town of Newton at the time prior to dropping the prosecution of this case [34] about the Rumery case? A. I don't think so. I don't even know who the Selectmen were. And unless you asked me by name, I wouldn't know. But I don't remember talking to any of them.

* * *

Q. But you did have some conversation with Chief Barrett before this whole matter was dropped? A. I'm fairly certainly I did talk it over with Chief Barrett.

Q. And I think my notes are correct that you—part of the discussion with Chief Barrett involved the possibility of a lawsuit against the Town of Newton and the police department by Mr. Rumery? A. That's my best memory that Chief Barrett had brought to my attention.

* * *

[35] Q. Do you recall whether you ever nol-prossed the complaint in the Plaistow District Court? A. I know I didn't do it. But I would [36] assume that Chief Barrett did. Although, like I say, I don't have any firsthand knowledge of that.

Q. How many occasions have you had since you have been involved in the practice of law as the County Attorney to

obtain a civil release in exchange for not presenting a case to the grand jury? A. This is the only case that I can think of that I have been involved with where this type of resolution is arrived at. I can think of one other case that I've handled which was a misdemeanor appeal in which the Exeter Police and defense counsel discussed the possibility of dropping that misdemeanor appeal in exchange for a release from the defendant not to file any suits as what I consider to be common sense resolution of the dispute.

But I don't recall any others that I have been involved with where the County Attorney's office did not present a matter to the grand jury.

Q. And can you give me a rough approximate figure of how many indictments you have presented to the grand jury since you have been active in the practice of law? [37] A. Well, I think I could fairly accurately say over 500. Perhaps over a thousand.

Q. Do you have any statement from Mrs. Deary in your file about this Rumery incident? A. No, I don't believe that I have any written statement from her. Her statements are incorporated into I believe Chief Barrett's report.

Q. Which has been marked as an exhibit? A. That's right.

Q. And if there were any tape recording made of a conversation of Mrs. Deary, it wouldn't have been—it's nothing that you have in your file? A. No, I don't have any tape recording.

* * *

DEFENDANT'S EXHIBIT A

[UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE]

C84-279-L

Hrg March 27, 1985

COVENANT NOT TO SUE

Covenant not to sue executed on June 6, 1983 by Bernard Rumery, of 26 Pine Street, in the Town of Danville, County of Rockingham, State of New Hampshire, herein referred to as covenantor, to Mary A. Deary, of 64 Highland Street, Town of Newton, the Police Department of the Town of Newton, and the Town of Newton, all of the County of Rockingham, the State of New Hampshire, herein referred to collectively as covenantee.

In consideration of the cessation and withdrawing of all criminal charges against the covenantor brought as a result of a claim by the first named covenantee, the covenantor does hereby agrees as follows:

1. *Covenant not to sue.* Convenantor will never institute any action or suit at law or in equity against covenantee, nor institute, prosecute or in any way aid in the institution or prosecution of any claim, demand, action, or cause of action for damages, costs, loss of services, expenses, or compensation for or on account of any damage, loss or injury either to person or property, or both, whether developed or undeveloped, resulting or to result, known or unknown, past, present, or future, arising out of the criminal charges lodged against and subsequent arrest of the covenantor.

2. *Binding effect of covenant.* This covenant shall inure to the benefit of covenantee and their heirs, assigns, successors, and legal representatives. It shall bind covenantor, his heirs, and legal representatives.

3. *Entirety clause.* This instrument reflects the entire covenant between covenantor and covenantee, and no statements, promises or inducements made by covenantor or any agent of covenantor that are not contained herein shall be valid or binding.

4. *Covenant understood by covenantor.* Covenantor has carefully read the foregoing covenant not to sue and knows the contents thereof.

In witness whereof, covenantor has executed this covenant at Exeter, N.H. this day and year first above written.

s/ BERNARD RUMERY
BERNARD RUMERY

STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS.

Personally appeared the above-named, Bernard Rumery, and made oath that the foregoing is true to the best of his knowledge and belief.

s/ STEPHEN J. C. WOODS
Justice of the Peace

(5)

Supreme Court, U.S.
FILED
JUN 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1449

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ETC., ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

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Supreme Court, U.S.
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JUN 20 1986
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CLERK

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1986
CERTIORARI GRANTED APRIL 21, 1986

ASPP

I

QUESTIONS PRESENTED FOR REVIEW

1. Does the mere possibility of prosecutorial abuse require a *per se* prohibition of all release-dismissal agreements on federal public policy grounds, regardless of the facts or circumstances of the case?

2. Are covenants not to sue police officers or public officials for alleged deprivation of civil or constitutional rights, offered in return for a prosecutor's agreement to drop pending criminal charges, valid and enforceable if given voluntarily and deliberately by an informed criminal defendant?

LIST OF ALL PARTIES

TOWN OF NEWTON (NEW HAMPSHIRE),
a municipal corporation;

DAVID T. BARRETT,
individually and as Chief of Police
for the Town of Newton;

KENNETH L. BOWERS, WILLIAM J. COOK and
MARY ALLEN, individually and in their official
capacities as Selectmen for the Town of Newton;
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit (Petition, App. A) is reported at 778 F.2d 66. The opinion of the United States District Court for the District of New Hampshire (Petition, App. B) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals (Petition, App. C) was entered on December 2, 1985. The petition for a writ of certiorari was docketed on February 28, 1986. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Relevant constitutional and statutory provisions include the First and Fourteenth Amendments to the Constitution of the United States (Petition, App. D-1), 42 U.S.C. § 1983 and New Hampshire RSA 641:5, I(b) (Petition, App. D-2).

Statement of the Case

Introduction

At issue in this case is the validity of a criminal defendant's post-arrest, pre-conviction waiver of his rights to a civil action pursuant to 42 U.S.C. § 1983, where the waiver has been found by a U.S. District Court Judge to be voluntary, deliberate and informed, executed with advice of competent counsel, in the absence of coercion, duress or improper motive.

Background

Bernard E. Rumery, a middle-aged insurance company marketing representive, was arrested on a warrant at his home on May 12, 1983, for tampering with a witness in violation of New Hampshire RSA 641:5,I(b), a class B felony.[1] His arrest resulted from telephone conversations with Mary Deary of Newton, New Hampshire, a widowed social and business acquaintance of Rumery, who was the victim and principal witness in a then ongoing case of aggravated felonious sexual assault. Her alleged rapist, David Champy, was a deer hunting companion of Rumery. Rumery said that after reading in a

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[1] "A person is guilty of a class B felony if

I. believing that an official proceeding . . . or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to . . .

(b) withhold any testimony, information, document or thing, . . ."

N.H. RSA 641:5,I(b).

local newspaper that Champy had been indicted, he coincidently chose Mary Deary, who also knew Champy, to call to find out who the victim had been. (J.A. 36) Mrs. Deary reported this telephone call to the Newton police on or about March 12, 1983. She felt that the call had been an attempt by Rumery to force her to drop the charges against Champy and to stop cooperating with the police.[2]

On May 11, 1983, while the criminal charges against Champy were still pending, Rumery and Mary Deary had a second telephone conversation which precipitated his arrest the following day. What Rumery actually said to Mrs. Deary in this second conversation was not adjudicated below.

Rumery admitted the conversation took place but asserted that the conversation was innocuous and that no threats were made. (Petition, App. A-3, B-3)[3]

However, the police report, n.2, *supra*, states that as a result of this second conversation Mary Deary was sobbing and hysterical. She reported that Rumery told her Champy's lawyer would nail her to the wall, and that "she and her daughter would end up like the two women in Brockton." The remark concerning "the two women in Brockton" was understood to refer to a then recent double shooting incident in which two women had been killed. (J.A. 31) The police report also indicates Mary Deary said Rumery boasted to her that "he had gotten Ron Silva [sic] off his rape case, and that he could do the same in this [Champy] case." Another of Rumery's hunting companions, Ron Silver, had either pleaded to, or had been convicted on a reduced charge in a previous and unrelated sexual assault case. (J.A. 31)

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[2] The police report is Ex. 1 to the deputy county attorney's deposition transcript, Def. Ex. C. The police report was admitted in evidence, not for the truth of Mary Deary's statements described therein, but as evidence of the information available to the officers at the time of Rumery's arrest for witness tampering. (J.A. 49)

[3] Rumery's version of the conversation, which is set forth in the Counter-Statement of the Case in Respondent's Brief in Opposition to the Petition for Certiorari, p. 2, was not admitted by the trial court for the truth of the matter.

After Rumery's first call to Mary Deary, the prosecutor in charge of the Champy case, Deputy County Attorney Brian Graf, became concerned about the effect of Rumery's statements on Mary Deary, who was both the victim and principal witness in the rape case. Graf and Newton Chief of Police David Barrett discussed Rumery's initial telephone call to Mrs. Deary. They also discussed the difficulty of obtaining corroborating evidence of witness tampering. (J.A. 48-49) Graf and Chief Barrett talked about getting authorization for a wiretap, but before this was done, the second telephone conversation occurred on May 11, 1983. (J.A. 50) Graf said Chief Barrett explained that "the situation had gotten out of control to such an extent . . . he felt he had to act." (J.A. 50)

Rumery was arrested and taken to the nearby Rockingham County jail where he was booked and then released on his personal recognizance. Within a week Rumery retained Stephen Woods, an experienced criminal attorney, to defend him. The trial court found that Woods was a very competent attorney with more than ordinary expertise in criminal law. (Petition, App. B-4)

Woods initiated contact with the prosecutor almost immediately. (J.A. 10) He told Deputy County Attorney Graf, "You had better *nol-pros* [sic] these charges, because we're going to win them and after that we're going to sue." (J.A. 11) Neither Graf nor Woods recalled specifically who first suggested a covenant not to sue in return for an agreement not to prosecute. (J.A. 11, 53) Woods testified, "after I had made this threat of a civil action the State was not willing to enter . . . a *nol-pros* [sic] *at that time* [prior to a probable cause hearing or grand jury indictment] without a release from Mr. Rumery of those threatened civil actions." (J.A. 20) (emphasis added) Woods understood this was in order to protect not only the police department but also the witness Mary Deary. (J.A. 20)

According to Woods, Rumery mentioned possible civil actions at their first meeting on or about May 18, 1983. Woods

"personally thought that too much of Mr. Rumery's attention was directed to the possibility of a civil action" (J.A. 12), and he had to calm his "excited" client (J.A. 22) in order to talk to him about the criminal matter. (J.A. 22) Woods himself drafted the covenant not to sue and arranged a face-to-face meeting with Rumery "to walk through the different possibilities." (J.A. 22)

Woods testified that he met with Rumery for one-half to one hour and discussed in detail the criminal justice system and, in less detail, potential civil actions which Rumery might have. (J.A. 12-13) He said he believed Rumery left his office with "a clear understanding of the different options that were open to him at that time." (J.A. 14) Rumery wanted to think about the matter further, and the covenant was not signed until about three days later, after Woods called Rumery to see if he had decided what course he wished to pursue. (J.A. 15)

Woods said he did not pressure Rumery to sign the covenant not to sue, except insofar as he gave his professional advice that it was in his client's best interest. (J.A. 14) Woods also stated that the prosecutor never exerted any pressure to have the covenant executed. On this point Woods testified:

> I don't think at any time Mr. Graf indicated that if Mr. Rumery didn't sign the release that they were going to have a probable cause hearing, an indictment, and proceed to trial. He just indicated that the criminal process would continue.
>
> . . . I mean, there was no indication that. . . Mr. Graf was therefore going to, you know, push this as far and as hard as he could. (J.A. 19)

The trial court found that no pressure was exerted by the prosecutor to have the covenant signed. (Petition, App. B-2)

Although Rumery denied conferring in person with Woods at his office about the covenant not to sue, the trial court found to the contrary. (Petition, App. B-2) Rumery conceded

that he took time to think about signing the covenant, and he read it before signing. (J.A. 40) While Rumery claimed he only partially understood the document, the trial court discounted this testimony. (Petition, App. B-4)

At the time the covenant not to sue was executed, June 6, 1983, Deputy County Attorney Graf believed there had been probable cause for the arrest and that there were grounds for seeking a grand jury indictment on the witness tampering charge if the victim, Mary Deary, was telling the truth. (J.A. 49)

As of June 6, 1983, Graf had "considerable concern about Mary Deary because the David Champy case was still pending" (J.A. 52), and he had learned by then of her reluctance to testify against Rumery, "that *she felt she had gone through enough.*" (J.A. 52) (emphasis added) Graf testified he "was taking into consideration the fact that [he] had her as a victim of one case [alleged aggravated felonious sexual assault],[4] and now, the State was in a position of perhaps having to force her to testify against her will [,] perhaps causing more trauma . . ." in the witness tampering case. (J.A. 52)

Graf viewed the covenant not to sue as "a possible common sense resolution of the problem [which] was up to Mr. Rumery as to whether or not he wanted to accept this resolution." (J.A. 53) Graf never met with or talked to Rumery. (J.A. 53) Graf said if Rumery had not signed the covenant:

> I don't know if we would have forced Mary Deary to testify through a grand jury subpoena if necessary because I didn't have to make that decision. But it was a possibility that certainly existed. (J.A. 54)

The prosecutor understood the proposed resolution to be "that the State would agree not to prosecute Mr. Rumery, and in exchange Mr. Rumery would agree that he would not sue

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[4] David Champy eventually pleaded guilty to a lesser included offense in the underlying sexual assault case.

anybody with respect to the case, and the matter would be put to rest for all parties." (J.A. 52) When Graf received the executed covenant not to sue from Woods, "the file that had been prepared for probable presentment to the grand jury was simply marked not presented and put in [the] closed file." (J.A. 53) The probable cause hearing which had been scheduled for June 14, 1983 was not held.

The State honored the agreement.

Ten months later, Rumery, having acquired new counsel, filed a six-count civil rights action against the Town of Newton, Police Chief Barrett, and the Town Selectmen. The complaint alleged federal claims under § 1983 and pendent state law claims, arising from Rumery's arrest for witness tampering.[5]

The Trial Court's Findings

This case comes to the Court upon findings of fact by the United States District Court for the District of New Hampshire (Loughlin, J.).

The trial court dismissed Rumery's multiple count civil rights complaint, following an evidentiary hearing at which testimony was given by Rumery, his criminal defense attorney, the deputy county attorney and Mrs. Rumery.

After hearing the testimony and weighing all the evidence concerning the execution of the covenant not to sue, the trial court held that the covenant was valid, having been the product of Rumery's voluntary, deliberate and informed decision. In reaching this conclusion, Judge Loughlin specifically found that Mr. Rumery, while represented by competent and experienced legal counsel, "intelligently and carefully, after weighing all the factors, concluded, that it would be in his best interest and welfare" to sign a covenant not to sue in connection with this arrest for witness tampering, in return for which, the

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[5] The state law claims alleged negligence, defamation, false imprisonment, negligent infliction of emotional distress, and state constitutional violations.

deputy county attorney agreed not to prosecute. (Petition, App. B-4). Furthermore, the trial court found that the prosecutor had not coerced or pressured Rumery into signing the covenant. (Petition, App. B-2).

On appeal, the United States Court of Appeals for the First Circuit chose not to question the trial court's findings of fact, but instead reversed purely on grounds of federal public policy.

The Reversal by the Court of Appeals

The United States Court of Appeals for the First Circuit, considering this an issue of first impression, concluded that Rumery's covenant not to sue could not serve to bar his civil action because release-dismissal agreements have the unavoidable effect of injuring the public interest.[6] The Court explained:

> Since the object of a criminal prosecution is to vindicate the public, not a private individual, an agreement not to prosecute should be upheld only where the *public* interest is served. [footnote omitted] It is difficult to envision how release agreements, negotiated in exchange for a decision not to prosecute, serve the public interest. (Petition, App. A-6) (emphasis in original)

The Court went on to say:

> Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claims, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights. (Petition, App. A-6)

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[6] Although the First Circuit's decision speaks in terms of "releases" and Rumery's "covenant not to sue," petitioners believe the decision's reasoning invalidates all form of waivers obtained in return for the dismissal of criminal charges, including stipulations as to probable cause.

The Court also intimated "that a defendant forced to choose between filing a civil rights claim and being prosecuted on a criminal charge cannot make an uncoerced choice as a matter of law." (Petition, App. A-7)

In addition, the Court concluded that *any* exception to a blanket prohibition against release-dismissal agreements is likely to promote police or prosecutors' efforts to obtain such releases and "an exception cannot easily be shown important enough to outweigh its administrative burdens." (Petition, App. A-8) (emphasis added)

Thus, the United States Court of Appeals for the First Circuit adopted the ultimate prophylactic rule, holding that a covenant not to sue for alleged deprivations of constitutional rights, executed in exchange for a decision not to prosecute criminal charges, is void *ab initio*, regardless of the circumstances surrounding the initiation of charges or the execution of the release.

Summary of Argument

By adopting a *per se* prohibition against all release-dismissal agreements, precluding any consideration of the facts and circumstances of individual cases, the First Circuit has unjustifiably restricted the discretionary authority of prosecutors and defense counsel alike. This "void *ab initio*" proclamation is not only unsupported by public policy considerations, but serves, in fact, to thwart the public interest.

Release-dismissal agreements which are entered into voluntarily, deliberately and knowingly, serve to protect law enforcement personnel who, acting in good faith, attempt to diligently enforce the law. Furthermore, such agreements encourage broad-based citizen involvement and assistance in the administration of justice, by protecting victims and witnesses from threats of retaliatory litigation when the state terminates prosecution of the cases in which they are involved.

Properly obtained release-dismissal agreements also provide prosecutors with a valuable tool for achieving even-handed justice and a flexible and individualized application of the law. Where criminal defendants voluntarily, knowingly, and deliberately choose to forgo potential civil rights actions in return for the dismissal of supportable criminal charges, both the State and the criminal defendant achieve desirable goals in an expedient and equitable manner.

The assumption, implicit in the First Circuit's blanket prohibition, that public prosecutors cannot be trusted to act in the interest of justice, even when subject to review under the "voluntary, deliberate and informed" standard, is unjustified. The American criminal justice system has adopted, and this Court has consistently reaffirmed, a policy of permitting, and in fact encouraging, plea bargaining agreements. Under this system, the nation's prosecutors are faced daily with precisely the same pressures and temptations which the "void *ab initio*" rule finds unacceptable. Operating under a constitutional standard which requires that plea bargains be "voluntary and knowing," prosecutors routinely further society's interest in the expedient resolution of criminal matters, without impinging upon the constitutional rights of criminal defendants. Petitioners see no reason why prosecutors will be unable to show similar restraint and integrity in the use of release-dismissal agreements.

Although there is clearly a public interest in insuring that criminal defendants are not coerced into relinquishing their civil or constitutional rights, a blanket prohibition against release-dismissal agreements is overbroad. The difficult choice confronted by criminal defendants who must decide between preserving the possibility of bringing a civil rights action and facing the possibility of criminal conviction by a jury of their peers, although difficult, is not inherently coercive. This Court has held that criminal defendants may be forced to make the difficult decisions inherent in the plea bargaining system. The criminal and civil ramifications of decisions made

by criminal defendants in the plea bargaining process create a significantly greater threat of coercion than do their decisions concerning release-dismissal agreements. Our criminal justice system, which tolerates and encourages such choices in one situation, should not preclude them in the other.

Release-dismissal agreements, obtained in a voluntary, knowing and deliberate manner, serve to further the public interest in the efficient and just administration of criminal law and simultaneously protect law enforcement personnel, governmental entities and society at large from the burdensome costs of defending retaliatory civil rights claims. At the same time, such agreements provide criminal defendants with an opportunity to utilize the remedies created by 42 U.S.C. § 1983 to quickly obtain a desired termination of justified criminal prosecution.

Arguments

I. Public Policy Neither Compels Nor Supports a *Per Se* Prohibition Against All Release-Dismissal Agreements

In adopting its *per se* prohibition against release-dismissal agreements, the United States Court of Appeals for the First Circuit identified four separate public policy considerations which purportedly compel a blanket prohibition against such covenants:

(1) No public interest is served where a criminal prosecution is abandoned in exchange for a release of civil liability;

(2) The enforcement of release-dismissal agreements would encourage prosecutors to "trump up charges," thereby suppressing evidence of police misconduct and chilling the assertion of individuals' constitutional rights;

(3) A criminal defendant forced to choose between filing a civil rights claim and being prosecuted on a criminal

charge cannot, as a matter of law, make an uncoerced choice; and

(4) Exceptions to a *per se* prohibition against release-dismissal agreements would pose administrative problems.

Although each of these four policy considerations raises legitimate issues of public concern, they do not, either individually or together, justify the First Circuit's blanket prohibition against release-dismissal agreements.

(1) *Under Appropriate Circumstances, As in the Case at Bar, Release-Dismissal Agreements Serve the Public Interest.*

In the decision below, Circuit Judge Timbers lucidly articulated the requirement that contracts or agreements arising within the sphere of the criminal justice system are valid only where the public interest is served.

> The need to closely scrutinize contracts or agreements in the criminal law context is particularly important because of the special relationship between a criminal prosecution and the public interest. Courts ordinarily are reluctant to set aside a contract provision in an ordinary agreement, because, no matter how badly off one of the parties may be, the agreement is likely to benefit both parties in some way. But an agreement in the criminal law context is different. Since the object of a criminal prosecution is to vindicate the public, not a private individual, an agreement not to prosecute should be upheld only where the public interest is served. (Circuit Court Decision, Petition App. A-6)

While the above-quoted proposition is beyond reproach, the First Circuit erred in its application of this rule to release-dismissal agreements in general, and to Rumery's covenant not

to sue in specific. The First Circuit's narrow definition of "public interest" apparently fails to encompass release-dismissal agreements because the benefits of such covenants appear, upon first glance, to flow primarily to the individual complainants, police officers or prosecutors, as opposed to the government or to society at large. Such a restrictive view of the public interest, however, fails to account for a number of widely recognized public policies which such agreements frequently serve to advance.

a. *Release-Dismissal Agreements Serve The Public Interest By Protecting Law Enforcement Personnel And Encouraging Citizen Participation In The Criminal Justice System.*

Realistically, not all criminal charges which are supported by evidence can be prosecuted because of the limited resources available. There are simply not enough prosecutors, criminal defense lawyers, judges and jails to accommodate this nation's massive criminal caseload. Nor is prosecution necessarily desirable in every otherwise provable case. In a system which does not provide sufficient resources to prosecute every case which could be prosecuted, the civil consequences of the prosecutor's decision not to prosecute necessarily becomes a matter of public interest and concern.

The protection of local law enforcement officials and private complainants from civil lawsuits, arising from their involvement or assistance in the administration of the criminal justice system, is undeniably in the public interest.

The public interest in effective law enforcement, in attracting and motivating dedicated police personnel and in encouraging victims of crime to report offenses freely and to assist law enforcement officials, does not require elaboration. This public interest is embodied in indemnity statutes for law

enforcement officials,[7] in witness tampering statutes such as New Hampshire RSA 641:5 and in statutory and judicially created privileges and immunities for individuals who report suspected criminal activity to law enforcement authorities.[8]

Indeed the "good faith" immunity defense, available under 42 U.S.C. § 1983, demonstrates the degree of public interest in protecting officials who exercise discretion in the public's behalf. Those who act reasonably within the scope of their duties do not incur individual private liability. *See Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

Those supporting the First Circuit's blanket prohibition against release-dismissal agreements may argue that the above-enumerated privileges, immunities and defenses, which evidence the governmental and societal interest in protecting law enforcement personnel and complainants, provide sufficient protection to those individuals so as to eliminate or minimize the adverse effects of the Court of Appeal's "void *ab initio*" proclamation. This argument, however, ignores the harsh reality that individuals, governments and society frequently pay a high price in litigation, regardless of the merit of claims or the eventual outcome of the cases.

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[7] For example, *See* N.H. RSA ch. 29-A (Supp. 1985) (defense and indemnification of county officials and employees; county attorney to represent and defend); N.H. RSA ch. 31:106 (Supp. 1985) (defense and indemnification of municipal employees in civil rights suits); N.H. RSA ch. 99-D (Supp. 1985) (defense and indemnification of state officials and employees; state attorney general to represent and defend).

[8] "Public policy demands that police investigations should not be thwarted by inability to obtain answers from persons who know the facts but fear civil actions." *Hutchinson* v. *New England Telephone and Telegraph Company*, 350 Mass. 188, 214 N.E. 2d 57, 59 (1967); *Vogel* v. *Gruaz*, 110 U.S. 158 (1884); *McGranahan* v. *Dahar*, 119 N.H. 758, 769; 408 A.2d 121 (1979) (Citizen reports of criminal activity, even though they are false and malicious, may not serve as the basis for an action in defamation).

The policy of protecting witnesses from civil liability in order to encourage public assistance in criminal investigations is also documented by N.H. RSA ch. 169-C:31, which grants immunity to citizens who report their suspicions of child abuse.

The public interest is acutely affected by the cost of defending civil actions brought against local public officials and municipalities. Experience suggests that even where the "good faith" immunity defense will likely insure a favorable verdict, the burden of civil litigation often compels settlement at "cost of defense". Even in cases where no "cost of defense" or other settlement expenses are incurred, the government entity, either directly or indirectly through increased insurance costs or unavailability of insurance, bears the substantial costs of defending against meritless claims.

Apart from attorney's fees and the costs of discovery, the government entities and society in general suffer from the lost man-hours taken up by depositions, court appearances, etc. Furthermore, and most significantly, the effective administration of justice is hampered by the demoralizing effect such litigation has on dedicated and diligent law enforcement personnel.[9]

Explicitly recognizing these public policy considerations, this Court has stated:

> In the context of Butz's attempted balancing of competing values, it is now clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risk of trial—distraction of officials from their governmental duties, inhibition of discretionary

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[9] Ironically, the First Circuit recently articulated its concern that qualified individuals may be deterred from accepting public office by the emotional as well as monetary costs of defending against civil rights suits, regardless of their eventual outcome. "Even if the actual time spent on a case away from his ordinary responsibilities were the same whether the damages claim was in or out, *the official's energy may be diverted from pressing public issues merely by the personal apprehension involved*. At least, the official sued for damages may have to retain his own personal counsel at his own expense. *In this litigious age all these concerns are legitimate, and might easily deter individuals from taking public office.*" *De Abidia* v. *Hon. Luis Izquierodo Mora*, No. 85-1505/85-1520, slip opinion (1st Cir. may 27, 1986) (emphasis added).

> action, and deterrence of able people from public service. There are special costs to 'subjective' inquiries of this kind.

Harlow v. *Fitzgerald*, 457 U.S. at 816 (1982).

Municipalities can, and often are, in effect, held hostage by vindictive claimants regardless of the legal merits of their claims.

In this sense, the benefits of properly obtained release-dismissal agreements do not serve the private civil interests of police officers, witnesses, victims and prosecutors who, because of indemnity statutes and insurance, are rarely subject to personal liability. Rather, they serve to protect the municipal, county or state entities charged with enforcing the law, as well as to encourage active public participation in the criminal justice system.

b. *Release-Dismissal Agreements Serve The Public Interest By Facilitating The Just Resolution Of Criminal Prosecutions.*

In addition to furthering the public interest in protecting law enforcement officials and private complainants involved in the criminal justice system, properly obtained release-dismissal agreements serve the public interest by providing both prosecutors and defendants with an effective and practical vehicle for achieving a just resolution of certain cases.

The public prosecutor's primary obligation is to use the discretionary power entrusted to him in the furtherance of justice.[10] In our system of justice, prosecution is not regarded as desirable in every case which may be supported by evidence:

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[10] In this regard, prosecutors are occasionally reminded that their overriding obligation is to do justice, not necessarily to obtain convictions. *See Berger* v. *United States*, 295 U.S. 78, 88 (1934).

> The public interest is best served and even-handed justice best dispensed not by mechanical application of the 'letter of the law' but by a flexible and individualized application of its norms. . .

Standards Relating to the Prosecution Function, § 3.9 comment at 94 (American Bar Association) (Approved Draft 1971) (hereinafter "ABA Standards"); National Prosecution Standards, Standards 8.1-9.4 (National District Attorneys Association, 1977) (hereinafter "NDAA Standards").

> An accused should be screened out of the criminal justice system when the benefits to be derived from prosecution or diversion would be outweighed by the costs of such action.

Criminal Justice Standards and Goals, Courts Standard 1.1 (National Advisory Commission 1973).

Thus, the equal but flexible application of the law to individualized facts and circumstances is a fundamental goal of the American criminal justice system. Properly obtained release-dismissal agreements further this public policy by providing both prosecutors and defendants with an additional alternative for resolving cases.

The circumstances surrounding the case presently before the Court serve to highlight the desirability of having a release-dismissal option available to defendants and prosecutors. The prosecutor in this case considered the interests of all concerned and accepted the covenant not to sue as a just resolution of the criminal proceeding. Deputy County Attorney Graf believed that there was probable cause to indict Rumery if Mary Deary was telling the truth. (J.A. 49) He was therefore under no legal duty to dismiss the case. He also knew Mary Deary was reluctant to testify against Rumery, because, *"she felt she had been*

through enough." (J.A. 52) (emphasis added) Graf was faced with the prospect of persuading Mary Deary to testify against Rumery, or, if necessary, forcing her to testify by subpoena. The latter, he said, was "a possibility that certainly existed." (J.A. 54)

Graf was understandably concerned about Mary Deary's emotional vulnerability as the victim of an aggravated felonious sexual assault and about her willingness to testify as the State's principal witness in both the witness tampering case and the rape case. (J.A. 52) The trial court specifically noted that Graf took into consideration "the trauma if Mary Deary was forced to testify" against Rumery. (Petition, App. B-2)

The prosecutor's decision in this case to forego the witness tampering charge and pursue the sexual assault case was not only a reasonable exercise of discretion in the public interest. It was also a compassionate humane decision as to the victim, furthering the public interest in protecting the witness which is embodied in the witness tampering statute itself. Graf could have also reasonably concluded, under the circumstances, that it was not necessary for purposes of retribution, deterrence or rehabilitation to prosecute Rumery, and that it was appropriate to relieve him, a businessman with no prior criminal record, of the stigma of further prosecution.[11]

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[11] "This occurs not infrequently in shoplifting cases, disturbances involving husbands and wives and a myriad of other disturbance situations. Often, the arrest and temporary detention of a person pending posting of bail or the releasing of the individual on his own recognizance is sufficient to diffuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable. Further prosecution in many cases would cause embarrassment in employment, unnecessary matrimonial hostility, or, as in the instant case, a possible thwarting of a future career. The reasons are multitudinous for a district attorney not to want to pursue the prosecution of a person arrested with probable cause for a minor public offense, in the best interest not only of society but of the individual involved." *Hoines* v. *Barney's Club, Inc.*, 28 Cal. 3d 603, 610, 620 P.2d 628, 633 n.7 (1980) (quoting dissenting opinion of Justice James B. Scott when case was before the Court of Appeal, First District, Division Three).

In deciding whether to prosecute, the prosecutor may properly consider the reluctance of the victim to testify, the nature of the offense, any undue hardship to the defendant, and various other mitigating factors. *See generally*, ABA Standards, NDAA Standards, *supra* at p. 17. Thus, the prosecutor in this case concluded on the basis of recognized public policy considerations that, while he was under no legal duty to dismiss the case, neither did justice require prosecution.

At the same time, however, Deputy County Attorney Graf knew that Rumery's lawyer was threatening civil action, and the decision to enter a *nolle prosequi* would leave the Town of Newton, Chief Barrett and Mary Deary exposed to the burden of civil litigation.

Mary Deary would be the critical witness in any action arising out of Rumery's arrest for witness tampering. Thus, given Rumery's prior activities, it was entirely possible that Rumery could use the threatened civil action as a means of further intimidating Mary Deary and the police in an attempt to influence the prosecution of Champy for Mary Deary's rape.

If Rumery was willing to forego any and all civil actions, in return for dismissal of the pending charge prior to a probable cause hearing or grand jury indictment, Graf concluded justice would best be served by entry of a *nolle prosequi*. The covenant not to sue was, in his own words, a "possible common sense resolution". (J.A.53)

Therefore, the availability of a "release-dismissal option" allowed the prosecutor sufficient discretion to arrive at a just resolution of the charges against Rumery while protecting a fragile but vital witness and maintaining the integrity of the more important sexual assault prosecution. Such a resolution could not have been achieved if the First Circuit's blanket prohibition against release-dismissal agreements were in effect at the time of the prosecution. Consequently, the availability of release-dismissal agreements furthers the public interest in encouraging the flexible and individualized application of the law.

c. *Release-Dismissal Agreements Serve The Public Interest By Providing Criminal Defendants With A Practical Tool For Asserting Their Constitutional Rights.*

Properly obtained release-dismissal agreements serve an important public purpose by providing an effective, inexpensive and accessible mechanism for enforcing individuals' constitutional rights pursuant to 42 U.S.C. § 1983. Although at first blush, the notion that a waiver of rights can serve as a mechanism for enforcing those rights appears oxymoronic, the release-dismissal agreement may well be a criminal defendant's most accessible and desirable means of asserting his constitutional rights.

Again, the specific facts of the case now before this Court underscore how release-dismissal agreements serve a public interest.

Rumery had been arrested for witness tampering. He faced possible indictment, conviction and imprisonment on those charges. Given the nature of the crime with which he was charged and the information which Mary Deary had provided to the police, it is apparent that Rumery's fate turned in large part upon whether the police, prosecutor, grand jury and petit jury believed his word over that of Ms. Deary.

As is often the case with criminal defendants, even those righteously professing their innocence, Rumery faced an uncertain future, dependent upon such intangible and unpredictable factors as how twelve strangers might weigh his credibility against that of an alleged rape victim. Rumery had no guarantees.

Faced with the uncertainty inherent in the criminal justice system, Rumery, through his attorney, took the offensive. "You had better nol pros (sic) these charges, because we're going to win them *and after that we're going to sue.*" (J.A. 11) (emphasis added) Thus, Rumery utilized his constitutional rights protected by 42 U.S.C. § 1983 to create leverage with

which he obtained a complete dismissal of the charges against him. As the trial court found, Mr. Rumery, while represented by competent and experienced legal counsel, "intelligently and carefully, after weighing all the factors, concluded that it would be in his best interest and welfare" to sign a covenant not to sue in connection with his arrest for witness tampering, in return for which the deputy county attorney agreed not to prosecute. (Petition App. B-4)

Had the First Circuit Court of Appeals adopted its blind prohibition against all release-dismissal agreements prior to Mr. Rumery's arrest, he would not have had the option of utilizing his rights protected by § 1983 to leverage a dismissal of the criminal charges against him. His future would have lain solely in the hands of the prosecuting attorney. The charges may have eventually been dropped due to considerations concerning the primary witness. On the other hand, it is just as possible that Ms. Deary would have either testified voluntarily or under subpoena, possibly resulting in Rumery's indictment, conviction and incarceration. Mr. Rumery chose to avoid that unpleasant possibility.

The rights protected by 42 U.S.C. § 1983, like any rights, are valuable only where the law permits the exchange of those rights for some form of desired consideration. Release-dismissal agreements provide criminal defendants with an option. They can preserve their rights under § 1983, take their chances at trial, and if successful, seek monetary compensation in the civil courts, or they can utilize those rights in the criminal forum in an attempt to obtain a dismissal of charges against them. In many situations, such as in the case at bar, the release-dismissal agreement is the most attractive alternative.

So long as the agreements are voluntary, deliberate and informed, they provide an inexpensive, accessible and effective means of utilizing and enforcing the constitutional rights protected by § 1983. They are a valuable tool which will be lost if the First Circuit's *per se* prohibition is affirmed.

(2) *The Danger Of Prosecutorial Misconduct Does Not Justify A* Per Se *Prohibition Against Release-Dismissal Agreements.*

The second public policy objection to release-dismissal agreements raises a legitimate issue of concern regarding the potential for prosecutorial misuse and abuse of such covenants. This concern, however, is insufficient to warrant a "void *ab initio*" rule, which precludes consideration of any of the facts and circumstances surrounding individual cases.

In support of its *per se* rule of prohibition, the Court of Appeals relied principally on three decisions from other circuits in which the Court of Appeals found evidence of improper prosecutorial motives: *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968); *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970); *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975).

In the seminal case *Dixon*, a black retired police detective sergeant was stopped by two white police officers for alleged traffic violations but was neither charged nor ticketed at the time. After filing a written complaint about the officers' conduct, Dixon apparently agreed not to proceed with his complaint and the government agreed not to bring traffic charges. Dixon filed a subsequent complaint and was then charged with two traffic offenses: failing to obey instructions given by a police officer, and obstructing the orderly flow of traffic. The prosecutor admitted he only filed the traffic charges because Dixon reneged on his agreement.

The Court of Appeals for the District of Columbia Circuit (Chief Judge Bazelon) characterized the prosecutor's action as a "gross abuse of discretion" and stated:

> We must therefore bar prosecutions which are brought because the defendant refused to promise or reneged on a promise not to file a complaint against the police. *Dixon*, 394 F.2d at 968-69.

In *MacDonald*, the defendant was arrested for driving under the influence of alcohol. He pleaded not guilty and demanded a jury trial. On the day of trial the prosecutor moved to dismiss the charge, but MacDonald refused to stipulate to probable cause. The prosecutor withdrew the motion and revived a charge of resisting arrest, which had been dropped, but on which he knew conviction was likely and, in fact, did occur. MacDonald was, however, acquitted on the original drunk driving charge.

The *MacDonald* record revealed that six deputy prosecutors in the district attorney's office indicated "either displeasure with the case or that it was a weak case or that they would not care to prosecute it" and it was further stipulated that one deputy prosecutor believed the police department was out to get MacDonald. The prosecutor himself stated, in effect, that he revived the resisting arrest charge in order to obtain a conviction because he feared MacDonald intended to sue the police department. *MacDonald*, 425 F.2d at 375.

The Court of Appeals for the Ninth Circuit deemed the prosecutor's tactics to be extortion and called the revival of the resisting arrest charge "the bludgeon behind the attempt" to hamper MacDonald in asserting his civil rights. *Id.* at 377.

In the *Boyd* case, the car in which Ms. Boyd was riding was stopped and searched by police officers, who searched its three male occupants and found nothing incriminating. Ms. Boyd refused to be searched, whereupon allegedly the police officers pushed her violently against the car, used abusive language, threatened her, arrested her, held her at the police station for five hours, and charged her with disorderly conduct and resisting a police officer. The release form in question was not presented to Ms. Boyd until some four months after her arrest when she appeared for trial on the criminal charges brought by one of the policemen. The prosecutor then offered to dismiss the charges on condition that she release the police officers and the City of Chicago from any and all claims arising out of her arrest.

The Court of Appeals for the Seventh Circuit said that the release was secured in such an inherently coercive context that it did not constitute an effective waiver of federal rights. The Court went on to find the release void as against public policy, relying, as did the Court of Appeals in the instant case, on the *Dixon* and *MacDonald* decisions, inferring from the circumstances that the primary purpose of the proffered release was to suppress evidence of police misconduct.[12]

The facts in the *Dixon*, *MacDonald* and *Boyd* cases give rise to their holdings, as the Court of Appeals for the Fourth Circuit pointed out in *Bushnell* v. *Rossetti*, 750 F.2d 298, 300 (4th Cir. 1984). In *Dixon* and *MacDonald*, the prosecutors had reason to suspect police misconduct yet they brought charges of dubious merit *after* the criminal defendants asserted themselves. Similarly, in *Boyd*, although the prosecutor did not bring the charges in reaction to the civil complaint, the circumstances there supported the Court's conclusion that the release was obtained under duress. The Courts in *Dixon*, *MacDonald* and *Boyd* fairly concluded that the prosecutors were not trying to do justice, but were instead attempting to punish or forestall assertion of civil claims.[13]

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[12] The *Boyd* Court also noted that the release would be of doubtful validity under state law, referring to the universal rule, followed in Illinois, that compounding a crime being itself criminal, an agreement not to prosecute is void, not only because it is against the policy of the law, but also because the agreement itself is a crime. *Boyd*, 513 F.2d at 87 n.5.

But see Hoines v. *Barney's Club, Inc.*, 28 Cal.3d 603, 610, 620 P.2d 628, 633 (1980) ("On no occasion has a prosecutor—motivated by what he reasonably deemed to be in the interests of justice—been held to have compounded a crime by promising to dismiss a charge in consideration of an accused's release of civil liability or stipulation of probable cause.")

[13] *Cf. Chaffin* v. *Stynchcombe*, 412 U.S. 17, 32 n.20 (1973) in which this Court held that the Due Process Clause did not bar a jury from rendering a higher sentence on retrial following a criminal defendant's successful appeal of a prior conviction but noted that if the only objective of a State practice is to discourage the assertion of constitutional right, it is "patently unconstitutional".

This suggests that the threat of a more severe criminal punishment is impermissible only where the *sole* basis for the higher sentence is the states' desire to discourage the assertion of constitutional rights.

Consequently, in each of these cases, the releases would have been invalid under the voluntary, deliberate and knowing standard applied by the trial court in the case at bar. Their facts and reasoning do not support a "void *ab initio*" policy, but rather, highlight the protection which a case-by-case application of the voluntary, deliberate and knowing standard affords.

Pointing to these cases of prosecutorial misconduct, the First Circuit concluded that a blanket prohibition against release-dismissal agreements was necessary to protect the public from the inherent danger such covenants presented.

> Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights. We agree with those courts which have found such releases have the effect of injuring the public interest. (Petition, App. A-6)

Petitioners do not deny that release-dismissal agreements can be misused. But, as demonstrated above, they can also serve justice in appropriate situations and can preserve the limited resources of the criminal and civil justice system at the same time. They can benefit the criminal defendant and the victim, as the agreement did in this case.

Furthermore, the individuals' civil and constitutional rights implicated by such covenants are protected by the "voluntary, deliberate and informed" standard applied by the trial court below. Public policy concerns are met if the charge is supported by evidence and the primary purpose of the prosecutor is not to cover up police misconduct, but to serve an identifiable public interest, as in this case. The realistic likelihood of misuse is not so great as the Court of Appeals assumes.

a. *The Potential Risks of Release-Dismissal Agreements Parallel Those Presented by Plea Bargaining, Which is Subject to a "Voluntary and Informed" Standard.*

In examining public policy considerations bearing on release-dismissal transactions, one's attention is inevitably drawn to analogous policy considerations bearing on plea bargaining transactions.

> In each transaction, an accused is confronted with a criminal charge, circumstances exist which—in the State's view—do not require seeking imposition of the full penalty of the law, the accused does not wish to assert his innocence of wrongdoing so as to hazard a more severe penalty should he not prevail at trial, and the State's interest would be not served by a time consuming trial.

Hoines v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628 (1980).

As the Supreme Court of California cogently stated in *Hoines*, the "net effects" of a properly obtained release-dismissal agreement and a properly conducted plea bargaining transaction are identical: to terminate a pending prosecution while imposing upon the criminal defendant some "lesser disability than he might otherwise anticipate." *Id.* at 612-13, 620 P.2d at 634.

> In the plea bargaining transaction, the accused is subjected to a known but lesser criminal sanction which he has elected to accept under the circumstances. In a release-dismissal transaction, the accused escapes criminal sanctions altogether but is subjected to a civil disability which he has elected to accept under the circumstances. In neither case is there any compulsion preventing the accused from standing his ground and asserting his right to be free from all disabilities, both criminal and civil.
>
> . . . .

> By requiring a release from the accused—but only by his free and voluntary election—the State accomplishes both the imposition of the bargained for disability and protection of those it reasonably deems to be innocently involved. This, however, is not a significant departure from what is achieved in a plea bargaining transaction.

Id.

The constitutional rights implicated in the plea bargaining situation are no less important than the First Amendment right to petition for redress of grievances which is implicated in the release-dismissal context. There is no difference of constitutional significance to the individual. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 365 (1978) (prosecutor's conduct, which merely presented defendant with alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate Due Process Clause).

Thus, the essential elements of a plea bargain agreement and a release-dismissal agreement are the same. The plea bargaining process presents an equally dangerous opportunity for prosecutorial misconduct. If, as the First Circuit believes, release-dismissal agreements would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights, then, most assuredly, plea bargaining invites the same misuse.

It is important to note at this juncture that the practical effect of a plea bargain has civil ramifications which go far beyond the mere disposition of criminal prosecutions. Where a criminal defendant enters into a plea bargaining agreement which includes a plea of guilty to a lesser included offense, the criminal defendant will be barred from pursuing a subsequent civil action under 42 U.S.C. § 1983 or state common law grounds arising from claims of false arrest and malicious

prosecution.[14] Having entered a guilty plea, the defendant is precluded from asserting an essential element to a cause of action for malicious prosecution; i.e. that the criminal matter was terminated in a manner favorable to the civil plaintiff.

Thus, plea bargaining agreements present at least as severe a threat of prosecutorial misconduct as do release-dismissal agreements. The primary difference being that in a release-dismissal transaction, the criminal defendant walks away from the agreement free and clear from any criminal charges or penalties, while in the plea bargaining situation, the criminal defendant waives the right to pursue subsequent civil action and at the same time incurs some form of criminal penalty. As the court stated in *Hoines*, "we are unable to discern any policy ground for distinguishing between a properly conducted plea bargaining transaction and a properly conducted release-dismissal transaction. If one is deemed to serve the public policy, then the other must also." 28 Cal.3d at 612-13, 620 P.2d at 634.

The validity of properly conducted plea bargaining transactions is beyond question. This Court has consistently reaffirmed its determination that the potential dangers of prosecutorial misconduct inherent in a system which permits plea bargaining are not so great as to require a *per se* prohibition against such agreements.

Rejecting policy arguments similar to those presented by the First Circuit in its decision below, this Court, in *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), upheld the validity of a statute which presented a threat of more severe penalties for those criminal defendants who opted to assert their constitutional right to a jury trial.

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[14] "(I)t is well settled that a plea of guilty is an effective bar to a subsequent § 1983 action based on a claim of false arrest and false imprisonment." *See, e.g., Griffen* v. *City of Mount Vernon*, 553 F. Supp. 1047, 1049 (S.D.N.Y. 1983).

> While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect upon the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas. . .
>
> . . . .
>
> It follows that by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Corbitt v. *New Jersey*, 439 U.S. at 220-22 (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 31 (1973).

Consequently, there is no doubt that the government may allow, and in fact encourage, criminal defendants to forgo their constitutionally protected right to a jury trial, and thereby waive certain rights to civil actions pursuant to 42 U.S.C. § 1983, under appropriate circumstances. Although such a system inevitably produces some threat of prosecutorial misconduct, the "voluntary, deliberate and informed" standard sufficiently protects the individual defendant and allows for the efficient administration of justice.

b. *The Case At Bar Illustrates The Impropriety Of The Per Se Prohibition.*

The specific facts and circumstances surrounding the case before the Court today vividly demonstrate that the First Circuit's "void *ab initio*" rule is incompatible with accepted public policy.

Deputy County Attorney Graf could have offered to abandon the witness tampering charges against Rumery in return for a guilty plea on a lesser offense. Assuming that the prosecu-

tor could identify a lesser included offense to a charge of witness tampering, and assuming that Rumery and his attorney were agreeable to a bargain, there is no question but that a plea bargain agreement would be permissible. If in fact such an agreement had been reached, Rumery would have incurred the criminal penalty attached to his lesser included offense. He would also have waived his rights under 42 U.S.C. § 1983 and state common law to bring a subsequent action for false arrest and malicious prosecution.

Under this hypothetical, the prosecutor would have been presented with precisely the same temptations to "trump up charges" as presented by the release-dismissal scenario. Furthermore, the validity of the guilty plea would be judged according to a standard of "voluntary and knowing" acceptance of the plea bargaining agreement. In this case, the trial court specifically found that Rumery's covenant not to sue was voluntary, deliberate and informed.

Consequently, the adoption of a *per se* prohibition against release-dismissal agreements would perpetuate an ironic and counterproductive situation in which prosecutorial conduct is judged by a "voluntary and knowing" standard when it involves the imposition of both criminal and civil disabilities, while simultaneously presenting a blanket prohibition against agreements which inflict only a civil disability, regardless of the circumstances surrounding the charges, or the voluntary, deliberate and informed nature of the agreement.

Such a contradictory system is unacceptable on its face, and will serve only to encourage the prosecution of cases which could otherwise be terminated in a manner agreeable to both prosecution and defense.

Petitioners do not mean to argue that official misconduct should be tolerated, but that society has other and more effective means of addressing this problem. As the plea bargaining/release-dismissal analogy underscores, the danger of prosecutorial misconduct inherent in these agreements is not so great as to warrant a *per se* prohibition against such covenants.

In a system which places a high priority on justice in individual cases, it should be permissible to enforce release-dismissal agreements which are given in a voluntary, deliberate and informed manner. The effect of the Court of Appeals decision in this case is to preclude the prosecutor from ever accepting an agreement, no matter how desirous the criminal defendant nor how compelling the circumstances. He can, of course, achieve similar results, so long as he forces the criminal defendant to incur a criminal penalty along with his waiver of civil rights claims.[15]

(3) *Under Appropriate Circumstances, As In The Case At Bar, Criminal Defendants May Make An Uncoerced Choice Between Filing Civil Rights Claims And Being Prosecuted On A Criminal Charge.*

The third public policy objection to any use of the release-dismissal agreements is based upon the supposition that, as a matter of law, criminal defendants forced to choose between asserting their civil rights and avoiding criminal prosecution, cannot make an uncoerced decision. This argument need not long occupy the Court as it flies in the face of accepted constitutional standards.

Again, the parallel between the release-dismissal agreements and plea bargaining transactions is inescapable. If a criminal defendant can, under appropriate circumstances, make an uncoerced choice between facing criminal charges which might result in the imposition of the death penalty or

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[15] A plaintiff-oriented civil rights litigation handbook prepared under the auspices of the National Lawyers Guild ends its discussions of release-dismissal agreements on this note: "We do not mean to suggest that a 'deal' should not be considered. In some cases, dismissal of criminal charges may be just what your client wants, irrespective of the fact that a civil suit will be foreclosed. *In this sensitive area, each case should be considered on its own merits.*"

Avery and Rudovsky, *Police Misconduct Law and Litigation* § 8.2(a) at 8-8 (2d Ed. 1986) (emphasis added).

instead waive his constitutional rights to a trial by submitting a plea of guilty to a lesser offense which carries a lesser penalty, how can the criminal defendant's choice between facing prosecution or relinquishing rights to a civil action be coercive, as a matter of law? The answer is self-evident.

In both situations, the danger of coercion exists. The existence of this inherent danger demands that such agreements be subject to a review which determines the voluntary, deliberate and informed nature of the criminal defendant's decision. There is, however, simply no rationale for applying a "voluntary and informed" standard to plea bargain while instituting a blanket prohibition against release-dismissal agreements.

As this Court has decided in plea bargaining cases, requiring a criminal defendant to make difficult choices concerning the rights he chooses to assert is not *per se* coercive.

> The criminal process, like the rest of the legal system is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the constitution does not by that token always forbid requiring him to choose.

Corbitt v. *New Jersey*, 439 U.S. at 218 n.8 (citations omitted).

Again, petitioners do not argue that release-dismissal agreements pose no danger of coercion. It is undeniable that a criminal defendant faced with a choice between criminal prosecution or abandoning potential civil rights claims will feel the pressure generated by the potential for conviction and the penalties which follow. The voluntary, deliberate and informed standard, however, provides sufficient protection to such defendants while providing them with an alternative which the *per se* rule would preclude.

(4) *The Administrative Economies Of A* Per Se *Prohibition Against Release-Dismissal Agreements Are Insufficient To Justify Such a Draconian Measure.*

While conceding that under some circumstances a release of civil rights claims in exchange for the termination of a criminal prosecution may be warranted, the First Circuit noted that any exception to their *per se* prohibition against such releases would "pose administrative problems." (Petition App. A-8) In support of this contention, the First Circuit stated that the judicial inquiry into whether the release was indeed made free of coercion would create administrative burdens outweighing any advantage which such releases might provide. This position ignores the practical reality of how such claims reach the courts.

Opponents of release-dismissal agreements argue that releases are unnecessary in those cases in which they are merited. In other words, where the criminal defendant voluntarily waives his civil rights claims and the prosecution acted reasonably, it is likely that the prosecutor will prevail in a subsequent civil rights action. While there is some merit to this contention, it runs contrary to the claim that a *per se* prohibition decreases the administrative burdens on the court system.

Where a voluntary, deliberate and informed release-dismissal agreement has been executed, as in the case at bar, the release serves to terminate the subsequent civil rights action at an early stage. In Rumery's case, the judicial system was taxed only by a relatively light burden of holding an evidentiary hearing, which conclusively determined that the covenant not to sue was a valid and enforceable bar to the plaintiff's claim. Obviously, where the evidentiary hearing results in a finding that the release-dismissal agreement is valid, the release serves to promote judicial economy by ending the litigation.

If the release was void *"ab initio"*, the civil parties would have borne the expenses and burdens of discovery, summary motions, etc. Because the "good faith" immunity defense often turns upon a factual determination of the defendant's motives and the propriety of his actions, and because trial courts, despite the *Harlow* decision, have been reluctant to grant summary judgment, such civil rights cases, regardless of their merits, are seldom dismissed at an early stage.

Admittedly, where a release-dismissal agreement is raised as a defense to a civil rights action, and that agreement is found to be invalid for failure to meet the voluntary, deliberate and informed standard, the litigation will continue and the administrative burden of the original evidentiary hearing will have been to no avail. However, the additional burden involved in such cases is far outweighed by the judicial economy achieved in those cases in which the release is held valid and the litigation is terminated at an early stage.

In addition, it is apparent, given the paucity of district and circuit court cases involving release-dismissal agreements, that the courts have not, and will not, be overwhelmed by a flood of litigation concerning the validity of such covenants. Given that the use of release-dismissal agreements is apparently a wide-spread practice,[16] and in light of the small num-

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[16] "Municipal court judges for many years have been accustomed to dismissing minor misdemeanor cases on motion of the district attorney upon assurance that law enforcement officers, public agencies or private parties will not be subjected to civil litigation by the criminal defendant. This occurs not infrequently in shoplifting cases, disturbances involving husbands and wives and a myriad of other disturbance situations. Often, the arrest and temporary detention of a person pending posting of bail or the releasing of the individual on his own recognizance is sufficient to diffuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable. Further prosecution in many cases would cause embarrassment in employment, unnecessary matrimonial hostility, or, as in the instant case, a possible thwarting of a future career. The reasons are multitudinous for the district attorney not to want to pursue the prosecution of a person arrested with probable cause for a minor public offense, in the best interest

ber of cases involving these covenants which have reached courts of record, it would appear that most criminal defendants who enter into release-dismissal agreements are satisfied with the results obtained. It may also be that most individuals who voluntarily enter into release-dismissal agreements, unlike Rumery, stand by their agreements.

Whatever the cause, disputes concerning the validity of release-dismissal agreements have not been an overly taxing burden on the administration of justice. The *per se* prohibition against covenants not to sue and releases exchanged in return for a dismissal of criminal prosecution is not justified by the potential for administrative economy.

II. Release-Dismissal Agreements Given Voluntarily, Knowingly And Deliberately Are Valid And Enforceable.

Having dispensed with the First Circuit's blanket prohibition against release-dismissal agreements, the Court may now turn to address the specific criteria for enforcing such covenants.

In the case at bar, the trial court determined the validity of Rumery's covenant not to sue based upon a standard requiring that the civil defendant affirmatively established that the agreement was voluntary, deliberate and informed. (Petition App. B-6)

The trial court below applied the appropriate standard.

To a very great extent, the arguments advanced above in opposition to the First Circuit's *per se* prohibition against release-dismissal agreements are equally applicable to support the "voluntary, deliberate and informed" standard applied by

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not only of society but of the individual involved. At the same time, it is reasonable to seek to protect the arresting officer or complaining individual from the burden of civil litigation arising out of the incident." *Hoines* v. *Barney's Club, Inc.*, *supra*, note 11, at p. 18.

the trial court below. Petitioners, therefore, in the interest of brevity, will not restate those agruments here, but instead rely upon the reasoning set forth above.

In particular, the Court's attention is directed to the recurring analogy between properly obtained release-dismissal agreements and properly conducted plea bargaining transactions. This Court has repeatedly reaffirmed its position that plea bargaining agreements are valid, and in fact desirable, so long as they are "voluntary and knowing". Petitioners see no justification for applying a more stringent standard to release-dismissal agreements.

The "voluntary, deliberate and informed" standard applied by the trial court below serves to encourage the proper exercise of prosecutorial discretion while providing sufficient protection for the constitutional rights of individual criminal defendants.

Conclusion

The trial court below determined that Rumery's covenant not to sue was a valid bar to his civil action. In reaching this decision, the court applied a standard basically identical to that utilized in determining the validity of plea bargaining agreements. The trial court held that the Town of Newton had the burden of affirmatively establishing that Rumery's covenant not to sue was the product of a voluntary, knowing and deliberate decision. By placing the burden of affirmative proof on the prosecuting authority, the district court created a rebuttable presumption of prosecutorial misconduct and coercion which the petitioners met and overcame. This rebuttable presumption provided the respondent with the safeguard against governmental oppression which the Constitution requires.

The First Circuit, in adopting its myopic prohibition, created an *irrefutable* presumption of prosecutorial misconduct and coercion.

The "void *ab initio*" proclamation rests on the implicit assumption that the power of prosecution is so overwhelming and the rights guaranteed by the Constitution so fragile that no agreement involving their exchange can ever be truly voluntary, knowing and deliberate. This assumption disregards the protections afforded by competent defense counsel, prosecutorial ethics and the availability of judicial review.

In light of this Court's reasoning in determining the validity of plea bargain agreements, the irrefutable presumption of prosecutorial misconduct and coercion is neither compelled by the Constitution nor justified by public policy or practical experience.

Although the issues presented by the case at bar concern matters of significant, and indeed, constitutional import, warranting the considerable efforts of counsel for both petitioners and respondent, and worthy of the attention given by the courts below as well as this Court's grant of certiorari, the question which the Town of Newton, New Hampshire asks this Court to decide is straightforward:

Do we, as a nation, have sufficient faith in the integrity of the individuals whom we appoint to enforce our laws, to permit them, under appropriate circumstances and subject to judicial review, to enter into voluntary agreements which may significantly restrict the remedies available to criminal defendants for alleged violations of their constitutional rights? Or, is the power of prosecution so great, the temptation for corruption so irresistible, and the threat of coercion so pervasive, that society must prohibit all such agreements without regard to their merits in individual cases?

Petitioners respectfully request that this court reverse the judgment of the United States Court of Appeals for the First Circuit and reaffirm the judgment of the United States District Court for the District of New Hampshire.

Respectfully submitted,

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No. 85-1449

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ETC., ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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PETITION FOR CERTIORARI FILED FEBRUARY 28, 1986
CERTIORARI GRANTED APRIL 21, 1986

BEST AVAILABLE COPY

I

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a covenant not to sue public officials for violations of constitutional rights, extracted under the threat of pending criminal indictment, prosecution, trial and punishment, and obtained for *nolle prosequi* of criminal charges, is void as against public policy.

LIST OF ALL PARTIES

TOWN OF NEWTON (NEW HAMPSHIRE),
a municipal corporation;

DAVID T. BARRETT,
individually and as Chief of Police
for the Town of Newton;

KENNETH L. BOWERS, WILLIAM J. COOK and
MARY ALLEN, individually and in their official
capacities as Selectmen for the Town of Newton;
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

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R.L. Wise, *Legal Ethics*, (2d Ed. 1970) 25

In the
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1449

TOWN OF NEWTON, ETC., ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

Opinions Below

The opinions below are adequately set forth in the Brief for Petitioners.

Jurisdiction

The jurisdictional requisites are adequately set forth in Brief for Petitioners.

Constitutional and Statutory Provisions

The constitutional and statutory provisions are adequately set forth in the Brief for Petitioners.

Counter-Statement of the Case

Factual Setting

Mr. Rumery, a middle-aged insurance representative, has lived all his life with his wife and children in the small rural New England village of Danville, New Hampshire. (J.A. 24). Rumery has had no other criminal arrests or criminal record. (J.A. 29). Rumery knew Mary Deary and her husband, both of Newton, New Hampshire, (which borders Danville), socially since approximately 1979, and had helped Mrs. Deary with insurance matters after her husband's death. (J.A. 25).

In March, 1983, after reading in a local newspaper that a mutual aquaintance, David Champney, had been arrested for sexual assault, Rumery telephoned Deary to ask whether she knew anything about the matter. (J.A. 25-26). During that telephone conversation, Deary confided in Rumery that she was the victim of the assault. (J.A. 25).

No further conversations between Deary and Rumery occurred until May 11, 1983, when Deary telephoned Rumery at his insurance office and expressed her reluctance to go forward with the criminal charges against Champney. (J.A. 26). Rumery testified in the District Court below that the telephone conversation was as follows:

> Deary: Well, I didn't want—David is a victim. I like David and he's the victim. I don't—I don't understand. He has to give [his wife] money. Her boyfriend's giving her money. The only money I'm getting is from John Hancock. He is the victim. I feel sorry for him.
>
> Deary: I don't know what to do. I don't want to hurt him. I don't know what to do.

Rumery: Well if you feel that way towards him then you can—it's possible to, to end this case. It's possible to stop the case.

Deary: Well I was told I couldn't.

Rumery: Well you can call the County Attorney if you want and talk to them about it.

Deary: I'm not a bad person. I'm not vindictive.

Rumery: Well that's up to you. That's all I can say. Look Mary, I have to leave. I have an appointment. If you want to call me I'll be in the office at 11 o'clock tomorrow morning. (J.A. 26-27).

On the very next day, at approximately 10:30 p.m., Chief of Police for the Town of Newton, David T. Barrett, with another police officer present, arrested Rumery at his home in the presence of his wife. (J.A. 27-28). Rumery was told by Chief Barrett that he harassed Deary and threatened her life. (J.A. 28). Rumery was handcuffed, taken to the Rockingham County Jail, and charged with the Class B Felony of tampering with a witness in violation of N.H. Rev. Stat. Ann. § 641:5(I)(b) (1974). (J.A. 28-29). (Petition, App. D-2).[1]

Prior to arresting Rumery, Chief Barrett consulted with Rockingham County Deputy Prosecutor Brian Graf about Rumery. Barrett was told by Prosecutor Graf that independent corroborating evidence would be required for the prosecution of Rumery. (J.A. 48, 49 & 50). Prosecutor Graf testified in his deposition, which was later used in the District Court below, that:

> From my point of view the problem in terms of prosecuting was to try to get some corroboration of these statements so that the state would not have to rely simply upon the uncorroborated testimony of Mary Deary. . . . The problem that I saw as a prosecutor is at that time I

[1] N.H. Rev. Stat. Ann. § 651:2(II)(b) (1974) fixes a maximum of seven (7) years imprisonment for conviction of a Class B Felony.

> would have to rely strictly on the testimony of Mary Deary because I don't believe there was any other independent evidence that had taken place. (J.A. 48-49).

Prosecutor Graf, however, was "pretty busy at that time" and "didn't have a lot of time to devote to this particular matter." (J.A. 50). Consequently, Prosecutor Graf did not follow up on obtaining any independent corroborating evidence; nor did Chief Barrett. (J.A. 50).

Despite discussing with Prosecutor Graf how to obtain the required independent corroborating evidence before arresting Rumery, Chief Barrett chose not to request an authorization for a wiretap; nor did he obtain a written affidavit from Deary (J.A. 56); nor did he obtain even a tape recorded statement from Deary (J.A. 56). Chief Barrett did not attempt to obtain any independent corroborating evidence whatsoever, despite Prosecutor Graf's expressed concerns, prior to arrest, about the lack of independent corroborating evidence against Rumery. (J.A. 50).

After learning that Rumery had been arrested by Chief Barrett without any independent corroborating evidence, Prosecutor Graf was "surprised" that Rumery had been arrested. (J.A. 50, 51).

Shortly after Rumery's arrest, and prior to indictment or a probable cause hearing, Chief Barrett issued several public statements to local newspapers which were reprinted and included the following proclamation:

> "We're serving notice that we just won't tolerate this kind of activity." (J.A. 22).

Rumery's personal and business relations and reputation in the community were severely damaged as a result of his unlawful arrest. (J.A. 22). Moreover, Rumery experienced severe emotional and psychiatric problems as a result of his unwarranted arrest. (J.A. 21).

Rumery retained Attorney Stephen J. Woods[2] to defend him on the criminal charge. Presentation for indictment before the Rockingham County Grand Jury was scheduled for June 13, 1983 and a probable cause hearing was scheduled for Plaistow District Court on June 14, 1983. (J.A. 19, 20).

Knowing the problems presented in prosecuting Rumery without independent corroborating evidence, and after discussing with Chief Barrett the issue of a potential civil rights action by Rumery against the Town of Newton and the Police Department (J.A. 51, 55), Graf told Attorney Woods that "the State would be willing to drop the prosecution of Mr. Rumery for the witness tampering charge in exchange for Mr. Rumery signing a release indicating that he would not sue the parties involved in the particular case." (J.A. 51). Prosecutor Graf indicated that if Rumery did not sign a covenant not to sue, the criminal process would in all likelihood continue which would include Grand Jury indictment, a probable cause hearing and criminal trial. (J.A. 19). According to Attorney Woods, the state was not willing to *nolle prosse* the criminal charge unless and until Rumery released his civil rights. (J.A. 20).

When presented with the covenant not to sue, Rumery was adamant against signing it. (J.A. 33). Attorney Woods testified in the District Court below that:

> Mr. Rumery felt he had been wronged by the criminal justice system and he wished redress from the criminal justice system. And he was reluctant to have criminal charges dropped in exchange for surrendering his possibility of redress from the system which he felt had wronged him. (J.A. 13).

Attorney Woods' overriding objective in representing Rumery, however, was to clear him, one way or another, of the pending criminal charge. (J.A. 21). Woods later testified

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[2] Stephen J. Woods, Esquire, became the Rockingham County Prosecutor on January 1, 1985, after having been elected in the county.

that he had little, if any, concern about Rumery's potential civil rights action against public officials for misconduct and constitutional violations. (J.A. 18). Woods did not apprise Rumery of any details or specifics about the nature or type of civil rights and remedies Rumery possessed against public officials for their alleged wrongdoings. (J.A. 20-21). Therefore, Attorney Woods recommended that Rumery sign the covenant. (J.A. 14).

While the threat of criminal charges, indictment, prosecution, trial and punishment were still pending against Rumery, he acquiesced and signed the covenant not to sue Mary Deary, the Newton Police Department or its legal representatives, and the Town of Newton or its legal representatives. (Petition, App. E-1). Thereafter, the criminal charges were *nolle prossed* by the prosecution. According to Prosecutor Graf, this was the only case, during his four and a half years as a Deputy County Prosecutor, in which he used a covenant not to sue to protect public officials and a private individual from civil rights litigation. (J.A. 55-56).

Jurisdictional Setting

In April 1984, Rumery filed in the United States District Court for the District of New Hampshire a six count[3] Complaint pursuant to 42 U.S.C. § 1983 (1982) alleging both federal

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[3] Respondent filed a Motion to Amend the Complaint to add Count VII which alleged that Prosecutor Graf was acting as agent for the Town of Newton, Chief of Police and Police Department in his role to obtain the forfeiture of Rumery's federal and state rights by virtue of the covenant not to sue. (J.A. 2—N.R. 15). While the District Court did not rule directly on the Motion to Amend, the District Court agreed that Prosecutor Graf was an authorized agent of the Petitioners. In the Court's Order dated April 29, 1985, the District Court stated: "The State and its subdivisions which include all Defendants by agreeing to the covenant through its *authorized representative*, Graf, gave up a potential defense to a possible lawsuit (which turned out to be an actual lawsuit) (emphasis added)." (Petition, App. B-4).

and pendent state law[4] claims arising from his arrest for witness tampering. Petitioners pled the covenant not to sue as an affirmative defense and the District Court dismissed the complaint finding that the covenant not to sue was valid. Judgment was entered on April 30, 1985.

Respondent filed an appeal with the Court of Appeals for the First Circuit in a timely fashion which reversed and remanded the District Court's decision on the grounds that the covenant not to sue was void as against public policy. The Circuit decision below was rendered on December 2, 1985. Petitioners filed their Petition for a Writ of Certiorari with this Court on February 28, 1986, which was granted on April 21, 1986.

Summary of Argument

Pre-conviction release/dismissal practices which involve extracting civil releases or covenants not to sue under threat of criminal indictment and prosecution are too injurious to be allowed and are void as against public policy.

Argument

I. Pre-Conviction Release/Dismissal Practices Are Too Injurious To The Public Interest To Be Sanctioned By This Court.

The First Circuit decision below unanimously held that covenants not to sue public officials for alleged violations of constitutional rights, when extracted under the threat of criminal indictment, prosecution, trial and punishment, and obtained for a decision not to prosecute on criminal charges are too injurious to the public interest to be condoned, sanc-

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[4] Respondent's state law claims alleged negligence, defamation, false imprisonment, negligent infliction of emotional distress and state constitutional violations (N.H. Constitution Part I, § 2 (Natural Rights); Part I, § 12 (Life, Liberty and Property); and Part I, § 15 (Rights of Accused)).

tioned, promoted or encouraged by the Court. *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985). Five specific areas of public interest are severely compromised as a result of such pre-conviction release/dismissal practices:

A. Pre-conviction release/dismissal practices suppress complaints and evidence of public offical abuse and misconduct;
B. Pre-conviction release/dismissal practices violate constitutional rights of a civil complainant;
C. Pre-conviction release/dismissal practices leave unremedied deprivations and violations of constitutional rights;
D. Pre-conviction release/dismissal practices tempt prosecutors to trump up charges in retaliation to/or in anticipation of civil rights claims; and
E. Pre-conviction release/dismissal practices create judicial administration burdens.

A. *Pre-Conviction Release/Dismissal Practices Suppress Complaints and Evidence of Public Official Abuse and Misconduct.*

> The major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. *Much more important, these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society.*

So stated Chief Justice Bazelon when the Court of Appeals for the District of Columbia was presented with a pre-conviction release/dismissal arrangement. *Dixon* v. *District of Columbia*, 394 F.2d 966, 968-69 (D.C. Cir. 1968). In *Dixon* a "tacit agreement" not to press criminal charges in exchange for a release of civil rights in a pre-conviction setting was addressed by the Court. The Court condemned pre-conviction release/dismissal practices as "odious" and against the public interest. *Dixon*, 394 F.2d at 969.

The public has legitimate and compelling interests in exposing to full public inquiry all civil complaints of public official misconduct and abuse of power. The effect of pre-conviction release/dismissal practices is to foreclose public inquiry into and exposure of unconstitutional and illegal government practices and suppress public official misconduct and abuse. *Bushnell* v. *Rossetti*, 750 F.2d 298, 301 (4th Cir. 1984). It was on this ground, *inter alia*, which the Circuit decision below distinguished pre-conviction release/dismissal practices from post-conviction release/dismissal practices. *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985).

The decisions of *Bushnell* v. *Rossetti*, 750 F2d 298 (4th Cir. 1984) and *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981) are the only two federal decisions which have condoned the use of release/dismissal practices. In both cases, however, the release/dismissal practices were conducted in post-conviction settings. In a post-conviction setting, police practices that ordinarily would be the subject of a 42 U.S.C. § 1983 (1979) claim would have been already exposed to full public inquiry during the criminal trial. *Bushnell*, 750 F.2d at 301.

In all other reported federal decisions, release/dismissal practices by prosecutors and police have involved "pre-conviction" settings, such as in the case at bar. *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985); *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975); *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968); *Horne* v. *Pane*, 514 F.Supp. 551 (S.D.N.Y. 1981). All of those decisions have condemned release/dismissal practices as against public policy. In a pre-conviction setting, allegations of public official misconduct and abuse have not yet received public exposure and inquiry. Such practices are highly injurious to the public interest and the public's right to know.

The public has a legimate and compelling interest in *not* suppressing complaints and evidence of official misconduct and abuse. Yet, Petitioners encourage this Court to adopt a

public policy which will promote and encourage prosecutors and police routinely to shield public official misconduct and abuse of power from public inquiry and exposure that could serve to uncover patterns of abuse and correct patterns of misconduct.

The public also has a legitimate and compelling interest in *not* barring meritorious civil complaints against public official misconduct and abuse. *See Gray* v. *City of Galesburg*, 71 Mich.App. 161, 247 N.W.2d 338, 340 (1976). While some civil actions alleging public official misconduct and abuse may be without merit, it is not the proper function of a prosecutor or police to unilaterally decide which civil actions have merit and which do not. Prosecutors and police are neither judge nor jury; they are not impartial; they hear no evidence; their decisions are not subject to judicial review or appeal. To permit and encourage prosecutors and police to "use the heavy threat of criminal prosecution to induce potential [civil] plaintiffs to waive their right of action presents too great a risk [to the public] that [they] will use the power to bar meritorious cases, leaving the victims of unlawful arrest without civil redress and concealing misconduct by the arresting party from judicial scrutiny." *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 638-39, 170 Cal.Rptr. 42 (1980) (Tobriner, J. dissenting with Byrd, C. J. and Newman, J., concurring).

As Judge Duniway stated in *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970):

> It is no part of the proper duty of the prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge. We do not mean that the prosecutor cannot present such a criminal charge. What he cannot do is condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case. The situation is made no better by the fact that

> here the record indicates that it was the court that asked MacDonald whether he would stipulate. Rather, it makes it worse. It brings the court to the aid of the prosecutor in coercing the defendant into agreeing to what amounts to a forfeiture of his civil rights.

Id. at 375.

Courts should not "become the 'enforcers' of these odious agreements" by encouraging or promoting suppression of complaints and evidence against public officials for misconduct and abuse. *Dixon* v. *District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968). Such conduct should be thoroughly aired in our free society.

In the case at bar, Respondent's complaints and evidence of civil wrongdoing by the police, municipality and prosecutor against him, in violation of his constitutionally granted civil rights, will be suppressed if the release is permitted to stand. The public's interest, as well as Respondent's, will be severely compromised, impaired and prejudiced by the suppression and non-disclosure of such illegal conduct.

B. *Pre-Conviction Release/Dismissal Practices Violate Constitutional Rights of Civil Complainants.*

The First Amendment to the Constitution of the United States protects the fundamental right of a civil complainant to petition the government for a redress of grievances. (Petition, App. D-1). Civil litigation is one form of an individual's fundamental right to petition the government for redress. *NAACP* v. *Button*, 371 U.S. 415, 429-431 (1963). The constitutional importance of access to the courts has been long recognized by this Court. *John* v. *Avery*, 393 U.S. 483 (1968); *Long* v. *District Court of Iowa ex rel. Lee County, Fort Madison, Iowa*, 385 U.S. 192 (1966); *Smith* v. *Bennett*, 365 U.S. 708 (1961); *Griffin* v. *Illinois*, 351 U.S. 12 (1956). The First Amendment also protects the freedom of speech and expression of civil litigants. *NAACP* v. *Button*, 371 U.S. at 429-431. When a civil

wrong has been committed by a government against an individual, civil litigation, as a means of exercising the freedoms of speech, expression and petition, is a significant mechanism for exposing, determining and correcting, if necessary, abuse and misconduct of public official power. Such fundamental and constitutional rights should not be violated or inhibited by pre-conviction release/dismissal practices by police or prosecutors.

Permitting and encouraging prosecutors and police to place individuals in "inherently coercive" dilemmas (*Boyd* v. *Adams*, 513 F.2d 83, 88 (7th Cir. 1975)), of surrendering fundamental rights of redress for constitutional violations, rather than risking criminal indictment, prosecution, trial and punishment, has a "chilling effect" on every individual's right to exercise the freedoms of speech, expression and petition. *Cf. Dixon* v. *District of Columbia*, 394 F.2d 966, 968 (D.C. Cir. 1968) ("If for example, the government had legitimately determined not to prosecute appellant and then reversed its position solely because he filed a complaint, this would clearly violate the First Amendment. The government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances.")

Furthermore, pre-conviction release/dismissal practices violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Circuit Court of Appeals for the District of Columbia stated:

> Moreover, a prosecution under such circumstances would be barred by the equal protection clause, since the government employs an impermissible classification when it punishes those who complain against police misconduct and excuses those who do not.

Dixon v. *District of Columbia*, 394 F.2d at 968.

In *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970), the Ninth Circuit Court of Appeals indicated that the pre-conviction release/dismissal practice in

that case amounted to a deprivation of the right of access to the courts and was a denial of equal protection and due process. *Id.* at 377.

In the case at bar, Respondent's fundamental and constitutional rights of speech and petition for civil redress, as expressed through civil litigation, were chilled and suppressed by the pre-conviction release/dismissal practice. Further, the pre-conviction release/dismissal arrangement in the present case violated Respondent's right of equal protection under the law. Prosecutor Graf employed an impermissible classification when he extracted a release of civil rights from Respondent, but had never engaged in such practice before.[5] The threat to criminally indict, prosecute, try and punish is, by its very nature, coercive, and an innocent criminal defendant, such as Respondent, will undoubtedly prefer to surrender fundamental and constitutional rights rather than risk the uncertainty of the criminal justice system.

C. *Pre-Conviction Release/Dismissal Practices Leave Unremedied Deprivations and Violations of Constitutional Rights.*

The First Circuit decision below declared that judicial enforcement of pre-conviction release/dismissal arrangements significantly injure the public interest, *inter alia*, by leaving unremedied deprivations of constitutional rights. *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985). The Court stated:

> The deputy county attorney was in a position to use the threat of prosecution as a sword while simultaneously shielding public officials from a civil rights claim. . . . In such a situation the prosecutor alone is holding the trump card to be played for the protection of those against

[5] "This is the only case that I can think of that I have been involved with where this type of resolution is arrived at." (J.A. 56).

> whom a potential civil rights claim may be asserted. This finesse is too injurious to the public interest to be sanctioned.

Id. at 69, 70.

All federal courts which have addressed pre-conviction release/dismissal practices have condemned the practice. *Cf. People* v. *Clark*, 123 Misc.2d 674, 474 N.Y.S.2d 409, 411 (N.Y. City Crim. Ct. 1984) ("Federal Courts, in particular, have condemned the practice of conditioning dismissal of criminal charges by the prosecutor upon the defendant's forfeiture of civil relief.")

In *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975), the Seventh Circuit addressed a release executed after arrest but before trial. Judge Cummings, writing for a unanimous court, held that the pre-conviction release was void as against public policy. *Id.* at 88. Similarly, in *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), the Circuit Court, addressing a "tacit agreement" to release civil rights claims in exchange for *nolle prosse* of criminal charges prior to trial, declared the arrangement as repugnant to public interests. *Id.* at 969. Likewise, in *Horne* v. *Pane*, 514 F.Supp. 551 (S.D.N.Y. 1981), the District Court addressed a release executed after arrest but prior to trial. Judge Knapp, writing for a unanimous court, declared the release invalid as a matter of law and stated:

> It seems to us beyond question that a criminal defendant forced to choose between being prosecuted on criminal charges on the one hand, and not being prosecuted but giving up certain constitutionally guaranteed civil rights on the other, cannot as a matter of law make an uncoerced decision.

Id. at 552.

Thus, the First Circuit decision below is in full accord with all three federal court decisions which have squarely addressed releases extracted after arrest, but while criminal charges were still pending. The Circuit Court below declined to apply "post-conviction" case holdings, such as in *Bushnell* v. *Rossetti*, 750

F.2d 298 (4th Cir. 1984) and *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), to the "pre-conviction" situation involved in the instant case. *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985).

Hanging the threat of criminal indictment, prosecution, trial and conviction over the head of Respondent and forcing him to sign a covenant not to sue releasing his civil rights against public officials for their alleged wrongdoings, has left unremedied deprivations and violations to Respondent's constitutional rights. Prosecutors and police should not be given the opportunity to use pre-conviction release/dismissal practices as "swords" and "shields" in the judicial process.

D. *Pre-Conviction Release/Dismissal Practices Tempt Prosecutors to Trump Up Charges in Retaliation to/or in Anticipation of Civil Rights Claims.*

In *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970), plaintiff was asked to stipulate to probable cause in exchange for dismissal of a criminal charge. When plaintiff refused, the prosecution amended its criminal complaint and added a second charge. On appeal, the Ninth Circuit Court of Appeals held, as a matter of law, that the prosecutor's retaliatory conduct violated the public interest. *Id.* at 375.

Likewise, in *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), plaintiff filed a complaint with the police on the conduct of two officers. The prosecutor thereafter entered into a "tacit agreement" with plaintiff that if plaintiff did not proceed with his civil complaint, no criminal charges would be brought against him. Plaintiff proceeded with the civil complaint against the officers and the criminal charges were then brought back against him. The Court of Appeals declared:

> [Such agreements] tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint. The danger of concocted charges is particularly

> great when complaints against the police usually arise in connection with arrests for extremely vague offenses such as disorderly conduct or resisting arrest.

Id. at 969.

Further, in *North American Cold Storage Company* v. *County of Cook*, 531 F.Supp. 1003 (N.D. Ill. 1982), a taxpayer's case brought under 42 U.S.C. § 1983, Judge Grady speaking for a unanimous Court, found a release signed by plaintiff to be "offensive to public policy" and void as a matter of law. *Id.* at 1009. The Court stated:

> Plaintiffs claim that the use of the release and the final order offends public policy. . . .The use of those documents may suppress complaints regarding official misconduct or malfeasance. . . .The releases may prove offensive to public policy in another way. When officials have overassessed property, they may in bad faith refuse to lower the assessment until they have obtained a personal release from the taxpayer. . . .The use of such a release may be particularly disturbing in that it may entail the use of official power of the purse to protect government agents from personal liability.

Id.

While there is no direct evidence at this time in the case at bar demonstrating that Prosecutor Graf or the police retaliated against Respondent with criminal charges, the fact that pre-conviction release/dismissal practices *tempt* prosecutors and police to retaliate against criminal defendants, such as Respondent, is sufficient for pre-conviction release/dismissal practices to be declared void as against public policy.

Petitioners argue that the potential risk and danger to the public interest of prosecutorial misuse and abuse of covenants not to sue is insufficient to warrant a void *ab initio* rule against such arrangements. *Brief for Petitioners* at 22. Petitioners argue that a showing of actual injury to the public interest must first be demonstrated before a release is declared void. An actual showing of public injury, however, should not be required

before concluding that pre-conviction release/dismissal practices violate public policy. Contracts which tend, or will tend, to subvert legitimate and compelling public interests are contracts which contravene and violate public policy. *See Gray* v. *City of Galesburg*, 71 Mich.App. 161, 247 N.W.2d 338, 340-341 (1976), (*quoting Mahoney* v. *Lincoln Brick Co.*, 304 Mich. 694, 8 N.W.2d 883, 887-888 (1943); *Federoff* v. *Ewing*, 386 Mich. 474, 192 N.W.2d 242, 245-246 (1971)).

> The question whether a contract is against public policy depends upon its purpose and tendency, and not upon the fact that no harm results from it. In other words, all agreements the purpose of which is to create a situation which tends to operate to the detriment of the public interest are against public policy and void, whether in the particular case the purpose of the agreement is or is not effectuated. For a particular undertaking to be against public policy actual injury need not be shown; it is enough if the potentialities for harm are present.

Id.

A desire by prosecutors and police to shield public officials from civil exposure offers an undeniable temptation to concoct and exaggerate criminal charges against an individual to enhance the government's bargaining position. Even the holding in *Bushnell* v. *Rossetti*. 750 F.2d 298 (4th Cir. 1984), which upheld a "post-conviction" release/dismissal practice, does not quarrel with those decisions voiding releases where the "potential" for forestalling exposure of possible constitutional or illegal government practices is present. *Id.* at 301.

E. *Pre-Conviction Release/Dismissal Practices Create Judicial Administration Problems.*

The decision below analyzed the public interest need for pre-conviction release/dismissal practices against public interest burdens which such practices present to the administration of justice, and determined that the administrative burdens

outweigh the need for such practices. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985). The Court recognized that permitting any pre-conviction release/dismissal practices would encourage and "promote police and prosecutors' efforts to obtain such releases." *Id.*

Presently, the judicial system does not appear to be overburdened with cases involving pre-conviction release/dismissal practices in light of the dearth of reported cases on the issue. This is most likely because such arrangements historically have been condemned and disfavored by courts and law enforcement agencies alike. *Cf. Boyd* v. *Adams*, 513 F.2d 83, 89 n.6 (7th Cir. 1975) ("Apparently the state's attorney's office [of Illinois] recognized the dubious validity of the releases as secure in exchange for dismissal of charges. . ."); *Dixon* v. *District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968) ("These agreements have been publicly condemned by the government of the District of Columbia.")

If this Court were to adopt Petitioners' position and permit a case-by-case analysis of the surrounding circumstances for each pre-conviction release/dismissal practice, the sheer number of cases in the civil judicial system will increase dramatically. In addition to facing a substantial increase in caseload, courts will be required to make "extensive investigation" into each case. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985). A case-by-case judicial determination into whether a pre-conviction release/dismissal practice was the product of coercion or not, will require a jury trial.

In *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 170 Cal.Rptr. 42 (1980), a case heavily relied on by Petitioners, plaintiff was arrested for disorderly conduct. The county prosecutor offered to dismiss the charge if plaintiff would sign a release of all civil claims against defendants. Plaintiff signed, and the criminal charges were dropped. Thereafter, plaintiff sued the defendants on state claims. The defendants raised the release as an affirmative defense. The Court submitted the defendants' affirmative defense to a jury for determination as to its validity. The jury implicitly found the

release valid and returned their verdict for the defendants. While *Hoines* did not involve the release of federal civil rights, the case demonstrates that jury presentation and determination should be part of the court's "extensive investigation" into the voidability of a covenant not to sue if a case-by-case approach is adopted.

Similarly, in the case of *Bucher* v. *Krause*, 200 F.2d 576 (7th Cir. 1952), the District Court submitted the issue of the validity of a release to a jury along with the case-in-chief. The jury found the release invalid and awarded plaintiff a verdict. Defendants appealed the jury determination insisting that the release issue should not have been submitted to a jury. *Id.* at 585. The Seventh Circuit held that the issue was properly submitted for jury determination. *Id.*

Likewise, in *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), also a case heavily relied on by Petitioners, appellant filed a civil rights action against public officials under 42 U.S.C. § 1983 (1979), *inter alia*. The District Court granted summary judgment to the defendants on the grounds that the appellant had signed a release in exchange for $500.00 paid to him. The Ninth Circuit reversed and remanded the case and declared:

> "...there is a triable issue of fact as to the validity of the release..."

Id. at 1206.

The holdings of *Hoines*, *Bucher* and *Jones* demonstrate that Respondent,[6] as well as any other civil claimant, has a right to a jury trial on the voidability of a covenant not to sue if a case-by-case determination is adopted.

Moreover, the need for pre-conviction release/dismissal practices is not important enough to overcome and outweigh the administrative burdens presented by such practices. *Rumery* v. *Town of Newton*, 778 F.2d 66, 70 (1st Cir. 1985). The First Circuit recognized:

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[6] Respondent requested a jury trial on all allegations of violations of his federal civil rights. (J.A. 1—N.R. 1).

> A release of a civil rights claims might arguably be given effect where the prosecution acts reasonably and has a fairly good case against the claimant. But in such a case, a good defense to a civil rights claim will exist and the need for a release will not come into play. Thus, the exception to the general rule of invalidity [of such releases] has the anomalous character of not applying where the police may desire it, and applying where they do not need it.

Id. at 70.

Petitioners argue that pre-conviction release/dismissal practices are needed for the "protection of local law enforcement officials and private complainants from civil lawsuits, arising from their involvement or assistance in the administration of the criminal justice system." *Brief for Petitioners* at 13. Petitioners' argument, however, overlooks special protection afforded by statutory and judicially-created privileges and immunities for law enforcement officials and individuals involved in the criminal justice system. For example, public officials are entitled, *inter alia*,[7] to the "good faith" immunity defense as described most recently in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Likewise, individuals who report suspected criminal activity are entitled to certain statutory and judicially-created privileges and immunities.[8]

In balancing the public interest need for pre-conviction release/dismissal practices against the public interest burdens presented by such practices, it is clear that the administrative burdens created by such practices clearly outweigh the need for such practices.

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[7] Municipal, county and state law enforcement officials, *inter alia*, in New Hampshire are entitled to legal representation, defense and indemnification under most circumstances. N.H. Rev. Stat. Ann. 31:106 (Supp. 1985); N.H. Rev. Stat. Ann. 29-A (Supp. 1985) *et seq.*; N.H. Rev. Stat. Ann. 99-D (Supp. 1985) *et seq.*

[8] Individuals in New Hampshire who report criminal conduct in good faith are absolutely immune from defamation actions under most circumstances. *McGranahan* v. *Dahar*, 119 N.H. 758, 408 A.2d 121, 128 (1979); *see also* N.H. Rev. Stat. Ann. 169-C:31 (Supp. 1985) (immunity to individuals who report child abuse).

II. Pre-Conviction Release/Dismissal Practices Are Inherently Coercive and Should Not Be Condoned by This Court.

Pre-conviction release/dismissal practices exercised by prosecutors and police, as authorized agents of local, state and federal governments, are inherently coercive and evil tactics exercised against individuals in our society. Such mechanisms should not be condoned or sanctioned by this Court.

The gravamen of Petitioners' argument in support of these insidious tactics is both shocking and insulting to the reasonable and rational sensibilities of the public interest. The heart of Petitioners' argument is that:

> The rights protected by 42 U.S.C. § 1983 (1979), like any rights, are valuable *only* where the law permits the exchange of those rights for some form of desired consideration. Release/dismissal agreements provide criminal defendants with an *option*. They can preserve their rights under 42 U.S.C. § 1983 (1979), *take their chances at trial*, and if successful, seek monetary compensation in the civil courts, or they can *utilize those rights* in the criminal forum in an attempt to obtain a dismissal of charges against them. In many situations, such as in the case at bar, the release/ dismissal agreement is the *most attractive alternative*. (emphasis added).

See *Brief for Petitioners* at 21.

Respondent takes strong exception to Petitioners' view that an individual's constitutionally-guaranteed civil rights are valuable only when those rights may be bargained away or traded off. Constitutionally guaranteed civil rights are inherently valuable; they are the very foundation of a free, independent and democratic society. Individuals do not need a "bargain-basement sale" setting to inject value into constitutionally-guaranteed civil rights. There is virtually nothing more inherently valuable or sacred in the American experience than those rights protected by the United States Constitution and by 42 U.S.C. § 1983 (1979).

Petitioners contend that pre-conviction release/dismissal arrangements present individuals accused of crimes with a reasonable and attractive option: forfeit constitutionally-guaranteed civil rights or take one's chances at criminal trial. It is difficult to imagine any confrontation between an individual and a government which presents a more offensive and insidious setting than does the "attractive alternative" championed by Petitioners.

Of course an "attractive alternative" to an individual placed by a government in an inherently coercive setting is to opt for release from that setting. What individual would not? And what attorney representing an individual under such circumstances would not recommend signing such a covenant not to sue in exchange for criminal charges being dropped? To do otherwise would subject the client to criminal trial; and the attorney to possible legal malpractice. There is little doubt that any individual accused of a crime, when presented with a pre-conviction release/dismissal arrangement, would nor choose to extract himself/herself from the inherently coercive dilemma. *See People* v. *Wilmont*, 104 Misc.2d 412, 428 N.Y.S.2d 568 (N.Y. City Crim. Ct. 1980); *Kurlander* v. *Davis*, 103 Misc.2d 919, 427 N.Y.S.2d 376 (S. Ct. Monroe Co. 1980); *People* v. *Siragusa*, 81 Misc.2d 368, 366 N.Y.S.2d 336 (Nassau Co. Dist. Ct. 1975). Such submission, however, does not "render the bargain voluntary." *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 637, 170 Cal.Rptr. 42 (1980) (Tobiner, J., dissenting with Byrd, C.J., and Newman, J., concurring); *see Horne* v. *Pane*, 514 F.Supp. 551, 552 (S.D.N.Y. 1981); *Boyd* v. *Adams*, 513 F.2d 83, 88 (7th Cir. 1975).[9]

As Judge Timbers indicated in the decision below, the need to prohibit pre-conviction release/dismissal practices is in

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[9] Both *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975) and *Rumery* v. *Town of Newton*, 778 F.2d 66 (1st Cir. 1985) rejected arguments that such releases should be upheld dependent upon which party first suggested the release or whether the individual's attorney was involved in negotiating the release.

large part due to the important and special relationship between criminal prosecution and the public interest. *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985). The primary objective of criminal litigation is to serve and protect the public interest; while the primary objective of civil litigation is to serve and protect private interests. Exchanging and releasing civil rights in a civil context is fundamentally different from exchanging and releasing civil rights for a decision to drop criminal charges in a criminal context. *Rumery* v. *Town of Newton*, 778 F.2d at 69. Prosecutors and police should not be permitted to "cross over the line" from the criminal forum to invade private interests in the civil arena.

In the case at bar, it was not part of Prosecutor Graf's proper role as a prosecutor or as an attorney to "bargain-away" the public interest decision to forego criminal charges against Respondent. When a pre-conviction release/dismissal arrangement is viewed in that light, it is no more than a "trade-off" of a public interest for a private interest. While there may be an indirect public interest in protecting public officials from civil liability incurred during employment, "if the officer's conduct was tortious, the public has no interest in denying their victims redress. If on the other hand, the public officers acted legally, they are afforded the full protection of the law and need not resort to the release for vindication." *Gray* v. *City of Galesburg*, 71 Mich.App. 161, 247 N.W.2d 338, 340 (1976).

Arrangements such as the one at bar are repugnant to public policy because they are inherently coercive and they deprive the public of vigorous enforcement of the laws for the dominant purpose of benefiting individuals. Such arrangements should not be encouraged or condoned by this Court.

III. Pre-Conviction Release/Dismissal Practices Are Unethical and Should Not Be Sanctioned, Condoned, Encouraged, Promoted, or Legitimized by This Court.

Some courts have gone so far as to suggest that pre-conviction release/dismissal practices are "akin to extortion." *See Sheppard* v. *Byrd*, 581 F.Supp. 1374, 1386 (N.D. Ga. 1984); *Horne* v. *Pane*, 514 F.Supp. 551, 552 (S.D.N.Y. 1981); *Boyd* v. *Adams*, 513 F.2d 83, 88 (7th Cir. 1975); *MacDonald* v. *Musick*, 425 F.2d 373, 375 (9th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970). Other courts have suggested that pre-conviction release/dismissal practices may constitute the crime of "compounding a crime."[10] *See Williamsen* v. *Jernberg*, 99 Ill.App.2d 371, 240 N.E.2d 758, 760 (1st Dist. 1968); *cf. People* v. *Beggs*, 178 Cal. 79, 172 P. 152 (1918) (compounding a felony); *but see Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 632-33, 170 Cal.Rptr. 42 (1980). While such sentiments may be overstatements, pre-conviction release/dismissal practices are unethical under the Model Code of Professional Responsibility (1969).[11]

> DR7-105 *Threatening Criminal Prosecution.*[12]
>
> A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

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[10] The elements of "compounding a crime" generally are: "1) knowledge of commission of the original crime; 2) an a greement not to report or prosecute that crime; and 3) receipt of a consideration." Lipson, *Compounding Crimes: Time for Enforcement?*, 27 Hastings L.J. 175, 177 (1975).

[11] The Model Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969 and was last amended in August 1980. The Model Code was replaced by adoption of the Model Rules of Professional Conduct by the American Bar Association on Augu 2, 1983. Since the pre-conviction release/dismissal practice at bar occurred prior to August 2, 1983, discussion of the Model Code is relevant.

[12] Under the Model Rules for Professional Conduct (1983), there is no precise equivalent to DR7-105.

Ethical Consideration 7-21 of the Model Code of Professional Responsibility (1969) articulates the rationale for DR7-105.

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to sue, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

The prohibition set forth in DR7-105 and EC7-21 against threatening criminal prosecution to obtain a civil advantage carries forward the same principle which was contained in Canon 15 of the Canons of Professional Ethics (1908).[13] R.L. Wise, *Legal Ethics*, at 97 n.9 (2d Ed. 1970).

Direct or indirect efforts by attorneys to present criminal charges against an individual to obtain an advantage in a civil matter have long been condemned by courts as unethical. *Bluestein* v. *State Bar*, 13 Cal.3d 162, 529 Pac.2d 599, 118 Cal.Rptr. 175 (1974); *In re Gelman*, 230 A.D. 524, 527 N.Y.S. 416 (1930); *In re Hyman*, 226 A.D. 468, 235 N.Y.S. 622 (1929); *People ex rel. Brundage* v. *Blakemore*, 309 Ill. 311, 141 N.E. 138 (1923). Likewise, prosecuting attorneys have been severely sanctioned by the bar for threatening criminal prosecution to obtain advantage in civil litigation. *In re Joyce*, 182 Minn. 156, 234 N.W. 9 (1930); *In re Bunston*, 52 Mont. 83, 155 P. 1109 (1916).

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[13] *Canon 15.* A lawyer is not obliged to use improper or illegal means to serve his client.

The same code of ethics which applies for private attorneys applies equally to public prosecutors. ABA Model Code of Professional Responsibility, EC7-13; 7-14; DR7-301(A). In addition to being bound to the Model Code of Professional Responsibility, prosecutors are subject, *inter alia*, to the American Bar Association Standards Relating to the Prosecution Function (Approved Draft 1971). While the ABA Standards permit a prosecutor to consider a range of factors that bear on the merits of prosecution, no authority permits a prosecutor to consider personal or private advantages that might accrue to himself or third parties from the exercise of power. *See* ABA Standards Relating to Prosecution Function, § 3.9(b) (Approved Draft 1971); *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d 628, 635, 170 Cal.Rptr. 42 (1980) (Tobiner, J. dissenting).

The case at bar demonstrates that a prosecutor's consideration of third party interests (i.e. police officers, municipalities, witnesses) undermines legitimate objectives of a prosecutor's discretion. Prosecutor Graf had serious concerns about the prosecution of Respondent prior to his arrest. To condone the prosecutor's continued criminal prosecution of Respondent, unless Respondent was willing to forfeit his civil rights, would be to condone irresponsible conduct by the prosecutor. If a prosecutor determines that criminal charges should be dismissed, then the prosecutor's "plain duty" is to dismiss the charges without stipulation. *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 620 P.2d at 636, 170 Cal.Rptr. 42 (1980). To permit a prosecutor to act as judge, jury, and prosecutor, as well as private attorneys for third parties, goes too far beyond his ethical obligations to the public.

> To permit a prosecuting attorney to have an interest of any nature whatsoever in any civil proceedings, directly or indirectly, and which proceedings involve similar facts or the same subject matter as a criminal prosecution then pending or thereafter initiated, can only give rise to suspi-

> cion concerning and relating to the motives of the prosecuting attorney involved, and bring such office into disrepute with the public.

State v. *Detroit Sales*, 62 N.J.Super. 336, 163 A.2d 227, 231 (1960).

IV. Pre-Conviction Release/Dismissal Practices Are Clearly Different From Plea Bargain Practices and the Two Practices Should Not Be Confused.

Petitioners rely heavily on plea-bargain practices in an attempt to justify pre-conviction release/dismissal practices. *Brief for Petitioners* at 26-29. Such reliance, however, is unfounded since there are significant and fundamental differences between the public interests involved in pre-conviction release/dismissal practices. Moreover, plea-bargaining practices have many opponents and critics, and the practice should not be used to permit pre-conviction release/dismissal practices.

The most fundamental difference between plea-bargaining practices and pre-conviction release/dismissal practices is obvious: in the former, the practice is limited to the criminal justice system; whereas in the latter, the practice confuses the civil and criminal justice systems. In plea-bargaining practices, there is a "mutuality of advantage" to the state and defendant. *Brady* v. *United States*, 397 U.S. 742, 752 (1970). The state's benefits include: 1) the more promptly punishment is imposed after an admission of guilt, the more effectively the objective of punishment may be served; 2) judicial and prosecutorial resources are conserved for those cases in which there is substantial issue of a defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof; 3) the public is protected from the risks posed by those charged with crimes who are at large or on bail while awaiting completion of criminal proceedings; 4) plea-bargaining leads to prompt and final disposition of many criminal cases; 5) plea-bargaining

avoids the corrosive impact of enforced idleness during pre-trial; and 6) by shortening the time between charge and disposition, plea-bargaining enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately sentenced. A defendant's benefits include: 1) avoidance of an extended pre-trial incarceration; 2) avoidance of uncertainty of a criminal trial; 3) speedy disposition of the case; 4) the opportunity to acknowledge and admit guilt; 5) a prompt start towards rehabilitation; and 6) potential leniency. *See generally Blackledge* v. *Allison*, 431 U.S. 63 (1977); *Santobello* v. *New York*, 404 U.S. 257 (1971); *Brady* v. *United States*, 397 U.S. 742 (1970); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). It is this "mutuality of advantage" to the state and defendant that probably explains why well over three quarters of all criminal convictions in the United States rest on pleas of guilt. *See Brady* v. *United States*, 397 U.S. at 752 n.10.

In the case at bar, the State of New Hampshire, the moving party in the criminal matter against Respondent, was not a party to the release, and therefore, received no benefit from it. The private interests of Mary Deary, the Police Department and the Town of Newton were protected and benefited. Moreover, the prosecutor threatened to go forward with an unnecessary criminal trial, which would have incurred needless state expenditures, in order to compel Respondent to agree to the release.

A significant problem with permitting prosecutors and police to bargain for civil releases in a criminal context is that it raises public suspicion that the decision not to prosecute has been tainted, and thereby undermines public confidence in both the civil and criminal justice systems. While Prosecutor Graf acted within proper limits in deciding to *nolle prosse* criminal charges against Respondent, he exceeded his discretion by disposing of Respondent's civil claims and protecting third party interests. Unlike plea-bargaining practices, the primary objective in pre-conviction release/dismissal practices is not to serve

the public interest; it is to shield private individuals from civil exposure and use releases as exculpatory tools. Such conduct is a dangerous and unwarranted extension of the plea-bargain concept and it should not be condoned by this Court.

Conclusion

WHEREFORE, the Respondent prays:

A. That the decision of the First Circuit Court of Appeals be affirmed; or in the alternative,

B. That the pre-conviction extraction of a covenant not to sue under threat of criminal indictment and prosecution be found to be void as against public policy.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, et al,

Petitioners,

v.

BERNARD E. RUMERY, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONERS

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Counsel for Petitioners and Respondent. Letters of Consent of all parties have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-three times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

ARGUMENT

THIS COURT SHOULD REJECT A PER SE PROHIBITION OF ALL RELEASE-DISMISSAL AGREEMENTS, AND SHOULD APPROVE SUCH AGREEMENTS THAT ARE VOLUNTARY, DELIBERATE AND INFORMED BY THE PRESENCE OF COUNSEL.

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *National District Attorneys Association,* the *International Association of Chiefs of Police,* various other associations of chiefs of police and sheriffs. Those briefs have often presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief to the law enforcement and public policy impact of the issues.

In the case below, *Rumery v. Town of Newton,* 778 F.2d 66 (1st Cir. 1985), the court rejected *all* release-dismissal agreements entered into by criminal defendants as void *ab initio. Amici* suggest that release agreements may be entered into either for legitimate or improper reasons. We concede that many abuses have occurred, and that a significant number of releases have been the product of some level of coercion, although most have been voluntary. A greater number of releases are *not* obtained under duress, but are reluctantly agreed to by individuals because the alternative involves lawful, but more adverse consequences. An example of the latter is the "resign or be fired" ultimatum, which has been upheld by numerous courts, *e.g., Enslen v. Village of Lombard,* 128 Ill. App. 3d 531, 470 N.E.2d 1188 (1984); *Britton v. City of Trinidad,* 687 P.2d 523 (Colo. App. 1984). Both cases involved public employees.

Some of the legitimate reasons for release-dismissal agreements entered into by criminal defendants voluntarily, deliberately, and when informed by their own counsel, are (1) to protect the interests of victims and witnesses, (2) to balance the interests of justice in cases where the continuation of criminal prosecution may be unnecessarily devastating to defendants, and (3) to protect police and municipalities from unfounded civil litigation arising from the arrest of defendants. *Amici* submit that these reasons are (1) proper, (2) do not violate the Constitution, (3) do not offend federal public policy when the agreement is enforced, and (4) are present in the instant case as reflected in the record where the defendant was represented by competent counsel who *sought* the agreement, and the prosecutor acted to avoid further anxiety for the victim who was also a key witness in a related case, and to protect the police and municipality from the defendant's threatened civil action. There is no evidence in the instant case of police or prosecutorial misconduct. The record also indicates that the prosecutor was not unmindful of the defendant's own best interest as served by the dropping of the criminal charge.

As noted by the Supreme Court of California in *Hoines v. Barney's Club, Inc.*, 28 Cal. 3d 603, 620 P.2d 628 (1980), quoting from the lower court:

> Municipal court judges for many years have been accustomed to dismissing minor misdemeanor cases on motion of the district attorney upon assurance that law enforcement officers, public agencies or private parties will not be subjected to civil litigation by the criminal defendant. This occurs not infrequently in shoplifting cases, disturbances involving husbands and wives, and a myriad of other disturbance situations. Often, the arrest and temporary detention of a person . . . is sufficient to defuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable. Further prosecution in many cases would cause embarrassment in employment, unnecessary matrimonial hostility or . . . a possible thwarting of a future career. The reasons are multitudinous for

> the district attorney not to want to pursue the prosecution of a person arrested with probable cause for a minor public offense, in the best interest not only of society but of the individual involved. At the same time, it is reasonable to seek to protect the arresting officer or the complaining individual from the burden of civil litigation arising out of the incident.
>
> If this tool is taken away from the district attorney, . . . there will be a likelihood that many cases which otherwise would have been dismissed will be prosecuted, to the detriment of society as well as the victim and the defendant.

28 Cal. 3d at 610, n. 7, 620 P.2d at 633, n. 7. (The case involved the enforcement of an out-of-state release given by a Nevada casino.) These proper interests were also highlighted by Judge Kilkenny in *MacDonald v. Musick,* 425 F.2d 373, 377 (9th Cir. 1970) (dissenting opinion) when he noted that ". . . those in charge of prosecution of criminal actions have a duty to protect, if probable cause exists, arresting officers from both *state or federal civil actions.*" (emphasis added).

Amici submit that many such suits, as threatened or filed, are baseless. The costs of defending them, however, are staggering and have led to a crisis in the ability of municipalities to afford, or even *obtain,* liability insurance covering actions under 42 U.S.C. Section 1983, and pendant exposure. Richard L. Germond, President of the National Sheriffs Association, highlighted the problem this way in the October-November 1985 issue of National Sheriff, President's Message:

> This exposure has obviously been one of the contributing causes for the phenomenal increases in insurance industry premiums. As an example, in my own situation, my county suffered nearly a 300% increase in premiums for both law enforcement liability and general liability coverages this year.
>
> . . .

> We all know that many cases are filed merely because governmental units are viewed as "collectible" and, even if the case is dismissed without trial or settlement, the defendant becomes liable for the costs of legal defense. *Too many cases are filed in hopes of an out of court settlement by the insurance company knowing full well there was no cause of action that would stand up in trial.* (emphasis added).

Even the media have taken notice of this liability crisis. In the New York Times of November 18, 1985, in an article entitled "Rising Tide of Liability Suits in Nation Forcing Changes in Lives," it was stated by Robert Lindsey at p. 16 cols. 1 and 2: "Hundreds of cities report that liability insurance rates have doubled or tripled or that liability insurance has become unavailable to them at any cost. Insurance companies blame a series of multimillion-dollar judgments against other cities. . . . "

Amici submit that the per se rule espoused by the court below for unenforceability of *all* release-dismissal agreements will defeat the legitimate interests of police administrators and prosecutors from protecting municipalities from baseless and frivolous civil litigation. The case-by-case approach for assessing the propriety of such agreements adopted by the Fourth Circuit Court of Appeals in *Bushnell v. Rossetti,* 750 F.2d 298 (1984), and the Ninth Circuit Court of Appeals in *Jones v. Taber,* 648 F.2d 1201 (1981), and other courts, adequately protects the interests of all parties—defendants, victims and witnesses, the police, prosecutors, and municipalities.

The rule that *amici* urge in such cases is *limited,* in order to ensure the protection of all proper interests: *only release-dismissal agreements formed at any phase of criminal proceedings that are voluntary, deliberate, and entered into by informed criminal defendants represented by counsel should be enforceable as a bar to subsequent civil litigation based upon the filing of the original criminal charge.*

Under such circumstances, these agreements are conceptually no different from plea agreements recognized as proper with appropriate safeguards by this Court in *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709 (1969), and *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160 (1970). As noted by the Supreme Court of California in *Hoines, supra,* "[s]urely we cannot embrace a proper plea bargaining transaction while rejecting a proper release-dismissal transaction as against public policy." 28 Cal. 3d at 613, 620 P.2d at 635.

Indeed, if release-dismissal agreements are per se void as against public policy, it is difficult to see how the entire plea bargaining process could have withstood scrutiny in *Boykin* and *Alford.* In effect, the parties in the instant case engaged in that very process. *Amici* submit that the narrow rule we urge will balance the proper interests of all parties and will not offend federal public policy or constitutional strictures. The record of the instant case amply demonstrates that the rule we urge was followed by the parties.

CONCLUSION

Amici respectfully request this Court to reject the per se rule adopted by the court below, and to approve as not violative of federal public policy or constitutional strictures, the enforcement of release-dismissal agreements formed at any phase of criminal proceedings that are voluntary, deliberate and entered into by informed criminal defendants represented by counsel, and urge that the decision of the court below should be reversed on the basis of law and sound judicial policy.

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In the Supreme Court of the United States.

OCTOBER TERM, 1985.

TOWN OF NEWTON, ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of the Town of Milton, Massachusetts, Amicus Curiae, In Support of the Town of Newton, New Hampshire.

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Brief of the Town of Milton, Massachusetts, Amicus Curiae, In Support of the Town of Newton, New Hampshire.

Interest of Amicus Curiae.

Pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, the Town of Milton, Massachusetts ("Milton"), submits this brief in support of the petitioners. The brief is presented for the Town of Milton, a political subdivision of the Commonwealth of Massachusetts, and is sponsored by Robert D. O'Leary, the town counsel and authorized law officer thereof.

As a municipality, Milton has a vital interest, in general, in ensuring that its police and other law enforcement personnel are able fairly and efficiently to carry out their duties. It is Milton's position that this interest is stifled by the recent adoption by the United States Court of Appeals for the First Circuit of a *per se* rule invalidating release agreements entered into by individuals facing criminal charges. This rule will severely hamper all municipalities in the exercise of their police powers, since they will not be able to expeditiously dispose of minor violations prior to trial but will be forced to prosecute all minor offenses in order to protect law enforcement personnel from unwarranted civil rights lawsuits. Since the use of releases has previously and repeatedly been upheld in Massachusetts, and since a release of the right to appear for arraignment in exchange for being discharged from custody has been officially approved by the Attorney General of Massachusetts, the issues raised in the instant case are of significant concern to Milton.

More particularly, Milton is a party to an action pending before the United States Court of Appeals for the First Circuit. *Hall* v. *Ochs*, No. 85-1993, which also involves the validity of a release executed by an individual who had been arrested for criminal offenses. The *Hall* case is scheduled for argument in the September, 1986 session of the First Circuit at Boston.

The Milton police arrested Bancroft D. Hall, the plaintiff, after the police responded to a telephone call by a citizen who was concerned about what appeared to be a breaking and entering into a dwelling and Hall, according to the police, would not identify himself by producing the registration for and license to operate the motor vehicle that he was in.

After the police brought Hall to the police station, a police lieutenant investigated Hall's presence at the dwelling. He concluded that Hall was not involved in a breaking and entering but also was satisfied that Hall was guilty of disturbing the peace and the statutory crime under Massachusetts General Laws,

Chapter 90, § 21 of refusing on demand of a uniformed police officer to produce his license and registration.

Massachusetts law, however, compels a police officer who makes a warrantless arrest to bring a person arrested before a magistrate unless the arrested individual waives that right. In the absence of waiver, failure to bring the arrested person before a magistrate makes the confinement false imprisonment.

Therefore, the police lieutenant told Hall that he had the option of bail or going before a magistrate and as an exercise of discretion, the lieutenant also offered Hall the further option of signing a waiver of his right to go before a magistrate and a release of claims against the police officers. After discussion with a friend, his daughter and his lawyer, Hall agreed to sign the waiver and release. He was promptly released. The police brought no charges against him.

Later, Hall commenced an action in the United States District Court for the District of Massachusetts alleging that he was falsely arrested and imprisoned in violation of state law and 42 U.S.C. § 1983. At trial the district judge directed the jury to return a verdict in favor of Hall against the police lieutenant and Milton for demanding a waiver and release. The jury returned a verdict against the remaining defendants and the court entered judgment in favor of Hall totalling $525,696.02.

Summary of Argument.

The Town of Milton, Massachusetts, supports the Town of Newton, New Hampshire, in this appeal. Whether a release is executed in a confinement or non-confinement environment, this Court should not adopt a *per se* rule invalidating releases or covenants not to sue public officials but rather approve the validity of releases executed in a voluntary, deliberate and

informed manner (Br. 5-7). Massachusetts as well as California considers releases of claims for false arrest and imprisonment valid in the absence of duress and coercion (Br. 7-8). Rejection of the Court of Appeals' *per se* rule would make the treatment of releases consistent for both federal civil rights claims and state tort actions for assault and false arrest and imprisonment arising out of the same occurrence. There are strong reasons of public policy in favor of releases. Massachusetts requires the police to bring a person arrested without a warrant before a magistrate but there may be circumstances that the police and the person arrested want to waive that right and drop the charges. A waiver of the right to appear before a magistrate is as a matter of Masssachusetts law a release (Br. 8-11). Furthermore, there is sound public policy in favor of terminating disputes. If civil rights claims cannot be settled in exchange for dropping criminal charges, municipalities would have great difficulties in the settlement of a civil rights claim (Br. 11). Releases in this context are very similar to plea bargains (Br. 12-13). The Court has fully endorsed the policy in favor of plea bargains. Finally, Congress is in the best position to decide what the public policy should be within this area (Br. 14).

Argument.

I. This Court Should Reverse the Decision of the Court of Appeals for the First Circuit Which Holds That Release Agreements Are Per Se Invalid As a Matter of Federal Public Policy, and Should Adopt the Case by Case Approach Already Sanctioned by Some Circuits.

A. *This Court Should Establish a Rule Upholding Releases Which Are Executed in a Voluntary, Deliberate and Informed Manner.*

In *Jones* v. *Taber*, 648 F.2d 1201 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit addressed the issue of the validity of a release of civil rights claims under 42 U.S.C. § 1983, executed by a prisoner. The court stated that the validity of the release of civil rights claims would be subject to scrutiny to determine whether the decision to execute the release was "voluntary, deliberate, and informed." *Id.* at 1203. The court, therefore, concluded that the validity of the release was a factual question suitable for a jury.

The "voluntary, deliberate, and informed" standard for assessing the validity of a release of civil rights claims, announced in the *Jones* case, was recently adopted by the Court of Appeals for the Fourth Circuit in *Bushnell* v. *Rossetti*, 750 F.2d 298, 302 (4th Cir. 1984). In the *Bushnell* case, the court upheld the validity of a release based upon an application of this standard to the circumstances surrounding the release agreement. The court specifically rejected an argument that "agreements releasing civil rights in exchange for criminal sentencing consideration are void as against public policy." *Id.* at 300. Based upon the facts that

Bushnell understood the significance of the release, consulted his attorney, and received a benefit, the court upheld the district court's determination that the decision to enter into the release agreement was voluntary, deliberate and informed. *Id.* at 302.

In refusing to adopt a *per se* rule of invalidity with regard to releases of civil rights, the court in the *Bushnell* case refused to expand upon the alternative holding in *Boyd* v. *Adams*, 513 F.2d 83 (7th Cir. 1975). In the *Boyd* case, after holding on the particular facts presented that a release agreement was ineffective as a waiver of rights since it was neither a voluntary nor an intelligent waiver, the court stated as an additional reason for its decision that the particular release at issue in that case was void as against public policy. *Id.* at 88-89. The court in *Boyd* relied on *Dixon* v. *District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968), and *MacDonald* v. *Musick*, 425 F.2d 373 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970).

The *Bushnell* court distinguished the *Boyd*, *Dixon* and *MacDonald* cases on the grounds that all involved instances of "abuse of prosecutional powers." *Id.* at 301. In any event, none of the cases announced a *per se* rule against the validity of releases.

B. *A Case-By-Case Approach to Determining the Validity of Release Agreements Is Appropriate in All Contexts.*

In the *Jones* case, which formulated a "voluntary, deliberate and informed" standard for determining the validity of releases of claims under § 1983, the court did not limit the applicability of the rule to certain contexts, such as post-conviction and presentencing situations. Rather, the court announced the standard with respect to releases of claims under § 1983 in general. *Jones* v. *Taber*, 648 F.2d at 1203. In discussing the objective factors to be taken into account in applying the standard, the court identified the "presence of a noncoercive

atmosphere for the execution of the release" together with the significance, under the particular circumstances, of the absence of such an atmosphere. *Id.* at 1204. Factors which the court considered important in judging whether any arguable coercive atmosphere was dissipated are the presence of an attorney representing the party signing a release, and a neutral environment. The court stated as follows: "We do not foreclose a finding of a voluntary release when the release is entered into by a prisoner without presence or assistance of counsel, but these circumstances must be weighed carefully." *Id.* at 1205.

C. *A Voluntary, Deliberate and Informed Standard of Analyzing the Validity of Releases Is in Harmony with Well Reasoned State Authorities.*

Under Massachusetts law, it has been long established that releases of claims for the state torts of false arrest and false imprisonment executed in the criminal arrest context are valid in the absence of coercion or duress, *Doherty* v. *Shea*, 320 Mass. 173, 68 N.E.2d 707 (1946); *Keefe* v. *Hart*, 213 Mass. 476, 481-482, 100 N.E. 558 (1913).

In the *Doherty* case the plaintiff, who had been arrested without a warrant for public drunkenness, later brought an action against the arresting officer. The arresting officer had not filed a criminal complaint against the plaintiff nor brought him to court prior to the plaintiff's release from custody. The court noted that the plaintiff had a right to be brought to court after he was arrested and stated that the officer's failure to bring a complaint "rendered the officer liable for false imprisonment." *Doherty* v. *Shea*, 320 Mass. at 175, 68 N.E.2d at 708. However, the court added:

> But the person arrested may waive his right to be brought to court and secure his discharge from cus-

> tody by agreeing with the arresting officer or the one holding him in custody that, if discharged, he will not hold him liable for detention, or by signing a release.

Id. See also *Wax* v. *McGrath*, 255 Mass. 340, 151 N.E. 317 (1926); *Horgan* v. *Boston Elevated Railway Co.*, 208 Mass. 287, 94 N.E. 386 (1911) and *American Railway Express Co.* v. *Stone* 27 F.2d 8 (1st Cir. 1928).

In a recent decision of the Supreme Court of California, moreover, the validity of a release which was "freely and voluntarily" executed was upheld in the face of an argument that such an agreement was against public policy. *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 607, 608-609, 620 P.2d 628, 631-632 (Cal. 1980).

II. There Are Strong Public Considerations Which Support Upholding the Validity of Release Agreements Which Are Entered into in a Voluntary, Deliberate and Informed Manner.

A. *Upholding the Validity of Releases Allows Needed Flexibility in the Exercise of the Police Power in the Public Interest.*

It is in the interest of the public for states to exercise their police powers in a manner which adequately protects the public health, safety, and welfare and, at the same time, allows flexibility for responding to the needs of specific circumstances. The availability of release agreements provides a practical method for allowing police, prosecutors and other law enforcement officials to exercise reasonable judgment in dealing with public offenses. Moreover, as the court in the *Hoines*,

supra, pointed out, release agreements often arise in the context of settling minor offenses. *Id.* at 610 n.7, 612. It is often in the best interests of the public and the defendant, to have minor misdemeanors disposed of without pressing charges as was pointed out by a lower court judge in California, and quoted with approval in the *Hoines* case:

> Often, the arrest and temporary detention of a person pending posting of bail or the releasing of the individual on his own recognizance is sufficient to defuse an otherwise volatile situation, to the end that further criminal prosecution is unnecessary and undesirable.

Id. at 610 n.7. This rationale applies in both the context of release-dismissal agreements and release-discharge agreements in which an individual is released from custody.

In Massachusetts, as previously discussed, the courts have repeatedly upheld the validity of release agreements executed by individuals under arrest who wish to waive their rights to appear in court for arraignment and to sue for false arrest and false imprisonment in exchange for being released without charges being brought. These agreements allow for the reasonable resolution of minor offenses. The police are able to respond immediately to perceived public safety problems. Prosecution of individuals may be reasonably avoided in appropriate circumstances, thereby conserving scarce law enforcement resources. As a result, the interests of the public are best served by not prosecuting everyone arrested for a minor offense.

As a practical matter, if a reasonable judgment is made in particular circumstances that criminal charges are not going to be pressed, it is vital that a mechanism exist to protect law enforcement personnel from unwarranted civil lawsuits. In

many instances, if charges are not immediately pressed and a civil action is subsequently brought, at some later date, for false arrest or false imprisonment, or for violation of civil rights based upon such allegations, law enforcement personnel may be disadvantaged in producing evidence to substantiate the grounds for the detention due to the time delay. The alternative protection would be to immediately press charges in all arrest situations. This would clearly not serve the public welfare.

Upholding the validity of releases, on the other hand, will not encourage police misconduct or prosecutorial abuse. By subjecting release agreements to a test of voluntary, deliberate and informed choice, legitimate complaints will be aired, and instances of abuse will be subject to scrutiny. The actions of both police and prosecutors should be subject to review to ensure that the system is operating in a fair and even-handed manner.

But it should not be presumed that law enforcement personnel are engaged in misconduct and abusive practices. However, this is exactly the presumption that the First Circuit Court of Appeals employed in reaching its result in the instant case. The court stated in *Rumery* v. *Town of Newton*, 778 F.2d 66, 69 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1633 (April 21, 1986):

> Enforcement of such covenants would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights.

This view of law enforcement activity is unfair. Does the Court of Appeals seriously believe that prosecutors "trump up charges"

in reaction to civil rights suits? Has this Court of Appeals even had such a case? Does the court believe that prosecutors as officers of the court "suppress evidence of police misconduct?"

B. *Upholding the Validity of Releases Which Are Entered into in a Voluntary, Deliberate and Informed Manner Permits the Settlement of Civil Rights Cases in Appropriate Circumstances.*

If this Court sanctions the *per se* rule invalidating release agreements, the availability of settlement options in civil rights cases will be barred as a practical matter. If releases are invalid, the problem of consideration for agreements will be an issue. Without an exchange of agreements, as in the release-discharge case, it is conceivable that only a substantial monetary consideration would suffice to support the existence of an enforceable agreement. This situation would not serve the public interest and would, therefore, effectively bar the settlement of civil rights claims against state officials.

A further reason to reverse the First Circuit *per se* rule is to avoid conflict with state law that upholds releases. In Massachusetts, once a person signs a waiver of the right to appear before a magistrate, the waiver itself constitutes a release of all claims for damages against the officer. *Horgan* v. *Boston Elevated Railway Co.*, 208 Mass. 287, 94 N.E. 386 (1911). Because most actions brought under 42 U.S.C. § 1983 also include pendent state claims for false arrest, battery and false imprisonment, a rule allowing the fact finder to determine the validity of a release would preclude the possible result that a release would bar a claim under state law but not bar the a claim under 42 U.S.C. § 1983 for the same occurrence.

III. The Decisions of This Court Relating to Plea Bargaining Support the Adoption of a Rule Upholding the Validity of Release Agreements in Appropriate Circumstances.

In its decision, the First Circuit Court of Appeals in the instant case placed special emphasis on the fact that a release agreement executed in a pre-conviction situation should be held void since the local authorities are in a position "to use the threat of prosecution as a sword." 778 F.2d at 69. The position taken by the First Circuit that the pre-conviction setting presents a potential for abuse which cannot be dealt with under the voluntary, deliberate and informed test, however, runs directly contrary to this Court's decisions in the area of plea bargaining.

Plea bargaining agreements between a prosecutor, representing the government, and a criminal defendant are obviously negotiated in the pre-conviction setting. Such agreements generally involve the government's willingness to drop some criminal charges or to recommend a more lenient sentence than it would otherwise seek in exchange for a guilty plea by the accused. These agreements have been sanctioned by this Court. *Mabry* v. *Johnson*, 104 S.Ct. 2543, 2547 (1984); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 361-362 (1978); *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977); *Brady* v. *United States*, 397 U.S. 742, 753 (1970).

In upholding plea bargaining agreements in general, this Court has subjected such agreements to scrutiny to determine whether the resulting guilty plea was voluntary and knowingly made.

> It is well-settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be col-

> laterally attacked. It is also well-settled that plea agreements are consistent with the requirements of voluntariness and intelligence — because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange. It is only when the consensual character of the plea is called into question that the validity of a guilty plea may be impaired.

Mabry v. *Johnson*, 104 S.Ct. at 2547. *See also Santobello* v. *New York*, 404 U.S. 257, 261-262 (1971) (footnotes omitted) (A plea in the context of plea bargaining must be "voluntary and knowing.").

Both this Court's rationale and the standard it imposes in the plea bargaining context apply with equal force in the context of pre-conviction release agreements. In both the plea bargaining situation, and situations involving releases of rights to sue for false arrest and false imprisonment given in exchange for the government's forebearance from pressing criminal charges, the threat of criminal prosecution exists. In both situations, however, an agreement has advantages for both the government and the accused. As previously discussed, the agreement in both contexts results in an efficient use of government resources and protects the public on one hand. On the other hand, the accused in the plea bargaining situation receives a less harsh result than might otherwise be anticipated, and the accused in the pre-conviction release agreement is spared criminal prosecution altogether. These striking similarities between the public policy considerations invoked in both plea bargaining and release situations were noted in *Hoines* v. *Barney's Club, Inc.*, 28 Cal.3d 603, 612-613 (1980). A guilty plea in a plea bargaining situation is an effective bar to a § 1983 claim. *Griffen* v.

City of Mount Vernon, 553 F. Supp. 1047, 1049 (S.D. N.Y. 1983); *Keyes* v. *City of Albany*, 594 F. Supp. 1147, 1155 (N.D. N.Y. 1984).

The adoption of a voluntary, deliberate and informed standard for upholding release agreements is therefore consistent with this Court's decisions in the area of plea bargaining.

IV. The Determination of Whether a Rule Should Be Adopted That Release Agreements Are Per Se Invalid Is a Question Suitable for Legislative Determination.

The Court of Appeals held that a covenant not to sue public officials "is void as against public policy." 778 F.2d at 71. It seems inappropriate for a Court of Appeals to formulate public policy when there is no broad-based support in either the United States Congress, other Courts of Appeals, state courts or legislatures for the proposition that releases are invalid irrespective of the circumstances.

In this case, a judge found that Rumery entered the release voluntarily and with advice of counsel. If such a release may or may not contravene the policy established by Congress in the Civil Rights Act, it should be for Congress to declare the appropriate public policy. Congress would have the benefit of hearing a variety of views. Congress could thereby balance the widespread use of releases against any abuse that may have in fact taken place.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Court should reverse the decision of the United States Court of Appeals for the First Circuit and adopt a rule upholding the validity of releases which are entered into in a voluntary, deliberate and informed manner.

Respectfully submitted,

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No. 85-1449

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TOWN OF NEWTON, et al.

Petitioners,

v.

BERNARD E. RUMERY, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the First Circuit

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BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND CIVIL LIBERTIES UNION OF MASSACHUSETTS IN SUPPORT OF THE RESPONDENT

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. All parties have consented to the filing of this brief, and letters expressing such consent have been lodged with the Clerk.

ISSUE PRESENTED FOR REVIEW

This brief addresses the important question whether a covenant not to sue public officials for violations of constitutional rights, in exchange for a prosecutor's agreement to nolle prosequi threatened criminal charges, is void per se as against public policy.

INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization which has over 250,000 members. The Civil Liberties Union of Massachusetts ("CLUM") is a state affiliate of the ACLU. Since their founding in 1920, both ACLU and CLUM have been exclusively concerned with the protection of the fundamental rights and individual liberties which are guaranteed by the constitution of the United States.

ACLU has filed briefs in this Court, as counsel for a party or as amicus curiae, in many cases involving the construction and application of 42 U.S.C. §1983 and related civil rights statutes. Both ACLU and CLUM have been particularly concerned by misconduct on the part of police officers which has resulted in violations of constitutional guarantees. CLUM has challenged on several occasions the type of release-dismissal agreement which is at issue in his case, most recently in Hall v. Ochs, 623 F.Supp. 367 (D. Mass. 1985), appeal pending, in which the court held invalid a release extracted from a prisoner who had been arrested without probable cause and assaulted by officers of the Milton, Massachusetts, Police Department.

SUMMARY OF ARGUMENT

An agreement for dismissal of criminal charges in exchange for a covenant by a potential criminal defendant not to sue

public officials under 42 U.S.C. §1983 unacceptably impairs a person's First Amendment right of access to the courts to vindicate claims of constitutional violation and undermines the remedy for such violations which has been provided by Congress in 42 U.S.C. §1983.

The decision below of the Court of Appeals for the First Circuit that release-dismisal agreements are void per se is squarely in line with principles established by decisions of this Court that a person's First Amendment right of access to the courts for vindication of federally guaranteed rights may not be impaired by a decision to prosecute criminally a person because of his or her exercise of federal rights. Holding release-dismissal agreements void per se provides full opportunity for public airing of charges of police and other official misconduct and prevents compromise of the criminal justice

system by dismissals of criminal complaints based on agreements shielding public officials from civil liability arising out of such complaints -- a matter wholly extraneous to the public interest at issue in a criminal proceeding.

Petitioners' position that release-dismissal agreements should be upheld if they are "voluntary deliberate, and informed" does not adequately protect the First Amendment Right of access to the courts to vindicate claimed violations of federally protected rights. No pre-trial release-dismissal agreement can be voluntary because the circumstances in which it is entered into by a person threatened with criminal charges are inherently coercive. Because of the risk of incarceration, fines, and civil disabilities, even an innocent defendant is virtually compelled to accept the terms of a pre-trial release-dismissal agreement.

The "voluntary, deliberate, and informed" standard would not invalidate release-dismissal agreements tainted by prosecutorial misconduct because that standard, as applied by the courts, focuses on the defendant's state of mind and his or her opportunity to make a considered decision in light of knowledge of the basic facts of the situation and not on the conduct and motivation of the prosecutor.

Judicial acceptance of a "voluntary, deliberate, and informed" standard for upholding plea bargains does not justify use of such a standard for judging the validity of release-dismissal agreements. A plea bargain properly focuses only on concerns involved in the criminal proceeding, and the "voluntary, deliberate and informed" standard is applied to plea bargains so the court may be assured that the defendant's guilty plea is truthful. A release-dismissal agreement, on the other

hand, focuses primarily on the private concerns of those officials seeking protection from civil action by the potential criminal defendant, which are extraneous to the criminal proceeding. Furthermore, the "voluntary, deliberate, and informed" standard has nothing to do with the public policy justifications claims for use of that standard to judge the validity of such agreements. That standard does not sort out meritorious civil claims from those without merit, does not protect only those law enforcement officials who act in good faith, and does not validate only release-dismissal agreements which result in a "just" resolution of the criminal proceeding.

In view of the pernicious interference by release-dismissal agreements with the First Amendment right of access to the courts to vindicate federal rights, any such agreements can be justified, if at

all, only if they serve compelling public policy needs that outweigh the constitutional rights with which they interfere. However, such agreements serve only the private interests of the public officials and other persons whose conduct is protected from civil suit and public scrutiny by such agreements, and petitioners have shown no public interest that would be served by upholding such agreements as are "voluntary, deliberate and informed.

Such agreements which are entered into voluntarily, deliberately and knowingly do not serve to protect only law enforcement personnel who act in good faith to diligently enforce the law. The "voluntary, deliberate, and informed" standard would not distinguish between law enforcement personnel who act in good faith from those who do not and would protect, improperly, the latter as well as the

former. Such agreements would not encourage broad-based citizen involvement and assistance in the administration of justice because when victims and witnesses report possible crimes they have no idea whether a release-dismissal agreement will ever be obtained or, if obtained, would be upheld under a "voluntary, deliberate, and informed" standard, which takes no account of the nature of the conduct of the victims or witnesses. The legal system provides protections for law enforcement personnel and private citizens by other means more direct, relevant, and effective than occasional, after-the-fact release-dismissal agreements.

Release-dismissal agreements which are "voluntary, deliberate, and informed" do not provide prosecutors and defendants with a vehicle for achieving a "just resolution" of certain cases. Whether such an agreement relating to an extraneous civil

matter is "voluntary, deliberate, and informed" has nothing to do with whether resolution of the criminal case is "just." A prosecutor's obligation under law is to exercise his or her discretion whether to prosecute solely in accord with the public interest served by the criminal justice system and not on the basis of a defendant's agreement to protect the private interest of certain individuals by agreeing not to institute a civil action against them.

Finally, release-dismissal agreements are not a proper tool for the assertion by potential defendants of their constitutional rights. Such agreements provide an inadequate and incomplete remedy for violations of individual rights. They deprive the victim of all other compensation and defeat the deterrent goals of the civil remedy provided by 42 U.S.C.§1983.

ARGUMENT

I. RELEASE-DISMISSAL AGREEMENTS UNACCEPTABLY IMPAIR ACCESS TO THE COURTS FOR VINDICATION OF CONSTITUTIONAL RIGHTS.

An agreement for dismissal by a prosecutor of criminal charges in exchange for a covenant by a potential criminal defendant not to bring a civil action against public officials under 42 U.S.C. §1983 unacceptably impairs a person's First Amendment right of access to the courts to vindicate claims of constitutional violation and undermines the remedy for such violations which has been provided by Congress in 42 U.S.C. §1983.

It is firmly established by the decisions of this Court that a decision to prosecute may not be based on the exercise by the potential defendant of protected constitutional or statutory rights. See e.g., Cox v. Louisiana, 379 U.S. 536, 557-558 (1965); Wayte v. United States, 105 S.Ct. 1524, 1531 (1985); United States v.

Goodwin, 457 U.S. 368, 372 (1982); Blackledge v. Perry, 417 U.S. 21, 27-29 (1974); North Carolina v. Pearce, 395 U.S. 711, 723-726 (1969); United States v. Falk, 479 F.2d 616, 618-619, 623 (7th Cir. 1973). The prosecution of a criminal case, or the threat of such prosecution, for the purpose of preventing or deterring the defendant from asserting a civil claim against the arresting officers or the prosecutor is plainly a prohibited interference with constitutionally guaranteed rights.

A cornerstone of our system of constitutional government is the right of access to the courts to seek redress for violations of rights guaranteed by federal law. See In Re Primus, 436 U.S. 412, 422-432 (1978); United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963) (all holding that First Amendment rights are impaired by restrictions on

access to the courts); see also Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental rights."); Bounds v. Smith, 430 U.S. 817 (1977).

Just as a prosecution which is brought in retaliation for the exercise of federally guaranteed rights is an impermissible burden on those rights, a prosecution which is pursued following the defendant's refusal to execute a release absolving the police and other public officials of all civil liability is a blatant interference with assertion of rights guaranteed by the First Amendment and by section 1983. Thus, for example, in MacDonald v. Musick, 425 F.2d 373 (9th Cir.), cert. denied, 400 U.S. 852 (1970),

the court of appeals granted habeas corpus relief to a defendant who was convicted of resisting arrest after the prosecutor withdrew a motion to dismiss criminal charges when the defendant refused to stipulate that there was probable cause for his arrest. In ordering that the defendant be released from custody, the court held that he had a right to seek redress for his claim that he had been badly beaten by the police, and that the purpose of the criminal prosecution was to preclude his exercise of that right.

> [T]he attempt, by imposing the stipulation as a condition to the dismissal of the drunk driving charge, was to hamper MacDonald in asserting, by civil action, both state and federal civil rights. And the revival of the resisting arrest charge was the bludgeon behind this attempt.

Id. at 377.

Moreover, such efforts to bar the assertion of federal claims are completely at odds with the goals of Congress in enacting 42 U.S.C. §1983, which "was

intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well." Owen v. City of Independence, 445 U.S. 622, 651 (1980).

For these reasons, most courts which have considered the validity of releases of civil-rights claims obtained in exchange for dismissal of criminal charges have found them to be invalid. E.g., Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975); Horne v. Pane, 514 F, Supp. 551, 552 (S.D.N.Y. 1981); cf. Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982); contra, Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 620 P.2d 628 (1980) (4-3 decision).

The decision in this case of the Court of Appeals for the First Circuit holding that release-dismissal agreements are void per se is squarely in line with these principles. It recognizes that only a

blanket rejection of such agreements can adequately protect an individual's access to the courts to vindicate violations of constitutional rights. Holding such agreements void per se also provides full opportunity for public airing of charges of police and other official misconduct and prevents compromise of the integrity of the criminal justice system from dismissals of criminal complaints based on agreements shielding public officials from civil liability arising out of such complaints -- a matter wholly extraneous to the public interest at issue in the criminal proceeding.

II. PETITIONERS' APPROACH TO RELEASE-DISMISSAL AGREEMENTS DOES NOT ADEQUATELY PROTECT THE IMPORTANT CONSTITUTIONAL RIGHTS AT ISSUE.

A. The Circumstances Surrounding the Pre-Trial Execution of a Release-Dismissal Agreement are Inherently Coercive.

The purpose of release-dismissal agreements, as the opinion of the court of appeals implicitly recognized, is not to protect the public official who is blameless from the burden of defending against "baseless" or "unwarranted" litigation. "[W]here the prosecution acts reasonably and has a fairly good case against the claimant . . . a good defense to a civil rights claim will exist and the need for a release will not come into play." Rumery v. Town of Newton, 778 F.2d 66, 70 (1985).

The release takes on importance, however, when a colorable civil rights claim may be asserted. A survey of the reported decisions shows that this is frequently the case. See, e.g., Hall v. Ochs, 623 F.Supp. 367 (D. Mass. 1985), appeal pending (black man assaulted by white police officers and arrested without probable cause); MacDonald v. Musick, 425

F.2d 373 (9th Cir.), cert. denied, 400 U.S. 852 (1970) (defendant alleged that "he was badly beaten by the police"); Boyd v. Adams, 513 F.2d 83, 85 (7th Cir. 1975) (civil rights complaint alleged that police beat and abused a pregnant woman); Dixon v. District of Columbia, 394 F.2d 966, note 2 (D.C. Cir. 1968) (retired black police officer charged two white police officers with brutality); Horne v. Pane, 514 F.Supp. 551, 552 (S.D.N.Y. 1981) (complaint alleged that defendant verbally abused plaintiff on account of his race, beat him, arrested him and left him handcuffed to a chair for hours). Indeed, in cases involving serious police misconduct, the underlying charge is often a "cover charge" which has been brought to protect the offending officers. Avery and Rudovsky, Police Misconduct: Law and Litigation, §8.2(a) (2d. ed. 1986).

The effectiveness of the release-dismissal agreement in shielding police misconduct derives from the fact that the defendant is virtually compelled to accept the terms of the agreement. As Justice Tobriner observed in his thoughtful dissent in Hoines v. Barney's Club, Inc., 28 Cal. 3d 603, 620 P.2d 628, 637 (1980) (Tobriner, J., dissenting), "[t]he threat to maintain a criminal prosecution is, however, necessarily coercive. An innocent defendant may well prefer to surrender his right to redress for false arrest rather than undergo the risk, expense and inconvenience of a criminal trial." The defendant in a criminal case faces the possibility of incarceration, fines and civil disabilities. Even the defendant who is wholly innocent of criminal activity will be reluctant to refuse the offer of dismissal under these circumstances. This is not, as the court below and numerous

other courts have concluded, an uncoerced choice. Rumery v. Town of Newton, supra at 69-70; Boyd v. Adams, supra at 87-88; Hall v. Ochs, supra; Horne v. Pane, supra at 552.[1]

B. Petitioners' "Voluntary, Deliberate and Informed" Standard Would Not Adequately Protect Defendants Against Prosecutorial Misconduct.

Even if the circumstances surrounding all release-dismissal agreements were not regarded as inherently coercive such agreements are void per se as against public policy because they are subject to possible prosecutorial misuse against which the ad hoc standard of "voluntary deliberate, and informed" would not guard.

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[1] Neither Bushnell v. Rosetti, 750 F.2d 298 (4th Cir. 1984), nor Jones v. Taber, 648 F.2d 1201 (9th Cir. 1981), is inconsistent with the majority view that the proposal of a release-dismissal prior to trial in a criminal case is "inherently coercive." The agreement at issue in Bushnell was signed after the court had found the defendant guilty on all charges. In Jones, there was no criminal prosecution and no "release-dismissal" agreement. The sole issue was the voluntariness of the release executed by the plaintiff.

Petitioners do not deny that release-dismissal agreements can be misused and can serve as vehicles for prosecutorial misconduct. (Pet. Br. 25.) This concern has led several courts to criticize attempts to obtain releases of civil claims in exchange for dismissal of criminal charges for their pernicious impact on our system of criminal justice. In Dixon v. District of Columbia, 394 F.2d 966, 969 (D.C. Cir. 1968), the court of appeals said:

> ... the major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. Much more important, these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society. And they tempt the prosecutor to trump up charges for use in bargaining for suppression of the complaint. The danger of concocted charges is particularly great because complaints usually arise in connection with arrests for extremely vague offenses such as disorderly conduct or resisting arrest.

These words were quoted with approval in Boyd v. Adams, 513 F.2d 83, 89 (7th Cir. 1975).

Petitioners acknowledge the impropriety of the releases given in the three decisions on which the court of appeals relied, Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968); MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970); and Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975). (Pet. Br. 24) But, they argue, "in each of those cases, the releases would have been invalid under the voluntary, deliberate and knowing standard applied by the trial court in the case at bar." (Pet. Br. 25) In fact, there is no reason to believe that those releases would have been found to be involuntary, and the standard suggested by the petitioners would have left the victims of abuse in those cases without an effective remedy.

Dixon v. District of Columbia, supra, involved a retaliatory prosecution for traffic violations, brought after the defendant allegedly reneged on an agreement not to file complaints of misconduct against the police officers who stopped him. Id. at 967. Notwithstanding what the court described as "blatant Government misconduct," Id. at 970, the release-dismissal agreement would almost surely have been upheld under the petitioners' standard. The agreement was entered into two days after the defendant was stopped by police officers for alleged traffic violations, before the defendant was either charged or ticketed, let alone incarcerated. Id. at 968. There are no facts which suggest that the defendant's decision to enter into the agreement was influenced by anything offer than making the "difficult decision" of choosing the certainty of dismissed criminal charges

over the uncertainty of prevailing both on a plea of innocence in a criminal trial and a section 1983 claim against the police officers. Petitioners themselves characterize this type of choice as uncoercive, that is, voluntary, deliberate, and informed. (Pet. Br. 31-32).

Similarly, MacDonald v. Musick, supra, involved the invalidation of a retaliatory amendment to a criminal complaint upon the defendant's refusal to stipulate to probable cause and thereby shield arresting officers from civil liability for false arrest. MacDonald did not determine that the circumstances surrounding the proposal to stipulate to probable cause were coercive in any sense other than that the threat of criminal prosecution itself amounted to coercion. Id. at 375 ("the situation is made no better by the fact that here the record indicates that it was the court that asked MacDonald whether he

would stipulate. Rather it makes it worse. It brings the court to the aid of the prosecutor in coercing the defendant into agreeing to what amounts to a forfeiture of his civil rights") (emphasis added).

In the single civil case cited by petitioners as an example of a litigation of a release which would have been invalid under the voluntary, deliberate and knowing standard, (Pet. Br. 24), the holding rested on recognition of the threat of the consequences of criminal charges as inherently coercive. Boyd v. Adams, 513 F.2d 83, 88 (7th Cir. 1975). The court of appeals based its conclusion of duress on the plaintiff's testimony that she "thought she would again be put in jail" if the criminal charges were not dropped because she would not be able to pay the fines required upon conviction. Id. at 87-88.

Indeed, the district court in Boyd, applying the standard urged by the petitioners, found that the release had been "that plaintiff had knowingly waived her right to pursue civil claims against defendants and . . . no coercion or duress of any sort had been exerted upon her." Id. at 87. The circuit court's reversal, approved by the petitioners, rested on characterizing plaintiff's fear of the consequences of a criminal prosecution as coercion.[2]

In sum, the courts in the Dixon, MacDonald, and Boyd cases invalidated the releases not because of prosecutorial misconduct but because of their view that the environment of arrest and threat of

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[2] The reversal also depended on an explicit rejection of the proposition that the coercive character of the situation could be negated because release-dismissal negotiations were initiated by plaintiff's counsel. Id. at 88

criminal charges in which such releases are obtained is inherently coercive -- a view which petitioners challenge.

At the end of their argument on prosecutorial misconduct petitioners tacitly admit that the "voluntary, deliberate and informed" standard advocated by them is not adequate to identify prosecutorial misconduct when they say, "Public policy concerns are met if the charge is supported by evidence and the primary purpose of the prosecutor is not to cover up police misconduct." (Pet. Br. 25) To determine that, of course, would require greatly expanding the scope of the inquiry beyond the confines of the "voluntary, deliberate and informed" standard to include an examination of the entire evidentiary basis of the proposed criminal charge, a full examination of all the facts surrounding the potential defendant's claim of police misconduct, and a full

examination of the facts and reasons alleged to underlie the prosecutor's decision to enter into the release-dismissal agreement. Petitioners advance no serious proposal that an ad hoc approach should really be so expansive. Indeed, such an expansive inquiry would undercut their argument that their approach would quickly and inexpensively dispose of many civil rights actions (all of them, in petitioners' eyes, groundless) and would not burden the courts with administrative costs and problems.

C. The Approach Approved for Plea Bargains Is Not Appropriate for Release-Dismissal Agreements.

Petitioners' final effort to brush aside the policy concerns of the circuit court is to seek to analogize release-dismissal agreements to plea-bargaining agreements. Petitioners argue that the policy considerations bearing on release-dismissal transactions are analogous to

those bearing on plea-bargaining transactions so that decisions of this Court subjecting the latter to a "voluntary, deliberate and informed" standard support the same approach to release-dismissal agreements.

The argument, while superficially appealing, does not withstand analysis. A plea bargain is very different from a release-dismissal agreement and is designed to serve different public policy considerations. A plea bargain necessarily presupposes that the prosecutor has just cause, and an adequate basis, for prosecuting some crime, and the negotiation is properly confined to considerations involved in the criminal proceeding itself and not matters extraneous thereto. See Bordenkircher v. Hayes, 434 U.S. 357, 363 at note 8 (1978). The protective requirement that a defendant's guilty plea in a plea bargain be "voluntary,

deliberate, and informed" is geared primarily to ensuring that the defendant's plea of guilty is truthful. See Brady v. United States, 397 U.S. 742, 757-758 (1970).

In the case of a release-dismissal agreement, on the other hand, there is no necessary presupposition that a prosecutor has just cause to prosecute anything, as indicated by the prosecutor's willingness to drop all charges and his concern that the conduct of law enforcement officials in bringing the charges has been such as to require protection from civil action through a release. In such a case, a prosecutor's statement that he will prosecute criminal charges unless the defendant signs a release of possible civil action is indistinguishable from an impermissible retaliatory prosecution. Furthermore, unlike the plea-bargain, in the release-dismissal situation the

negotiation necessarily focuses primarily not on matters involved in the criminal proceeding itself, but on the wholly extraneous matter of a possible civil action that may not even have been instituted.

Most critical to the distinction between the plea bargain and the release-dismissal agreement is that while the "voluntary, deliberate and informed" standard is relevant to the objective of ensuring that the defendant's guilty plea is truthful, that standard, as applied to the release-dismissal agreement, has nothing to do with what the petitioners cite as the policy justifications for using that standard to judge the validity of such an agreement. They emphasize repeatedly that such agreements protect law enforcement personnel and governmental entities from unjustified civil actions and enable defendants to obtain quickly a

desired termination of justified criminal prosecution. Yet the standard of "voluntary, deliberate and informed" urged by petitioners does not distinguish between "justified" and "unjustified" civil actions and "justified" and "unjustified" criminal prosecutions. The conduct of law enforcement personnel can be the most outrageous imaginable, and the criminal charges can be wholly fabricated, and if the release-dismissal is "voluntary, deliberate, and informed" the release would stand. That standard, which takes no account of the possible misconduct which might form the basis of the civil rights claim and no account of the supportability of the criminal charges, inherently would permit precisely the kind of police and prosecutorial misconduct with which the circuit court was concerned.

In sum, plea-bargaining, as approved by this Court, focuses wholly on the public interest involved in the criminal proceeding itself -- a matter within the scope of the prosecutor's proper concerns -- whereas release-dismissal agreements focus on matters extraneous to the criminal proceeding and involve the prosecutor in resolution of civil actions in which he has no stake and no proper role. The differences between plea bargains and release-dismissals are accompanied by different public policy considerations which make an approach based on a "voluntary, deliberate, and informed" standard appropriate for plea bargains but wholly inappropriate for release-dismissal agreements.

Plea bargaining serves important public interests in the fair, individualized, efficient and effective functioning of the criminal justice system.

Release-dismissal agreements serve no such public interest but compromise the criminal justice system solely to protect private interests against civil suits. Use of the "voluntary, deliberate and informed" standard to judge the validity of release-dismissed agreements does not serve a significant public interest and does not protect civil rights claimants against what all parties recognize as the potential for abuse of release-dismissal agreements.

III. THERE ARE NO COMPELLING PUBLIC POLICY REASONS FOR UPHOLDING EVEN THOSE RELEASE-DISMISSAL AGREEMENTS THAT ARE ALLEGED TO HAVE BEEN ENTERED INTO "VOLUNTARILY, DELIBERATELY AND KNOWINGLY."

Petitioners "do not deny that release-dismissal agreements can be misused" (Pet. Br. 25) and the amici curiae Americans for Effective Law Enforcement, Inc.; The International Association of Chiefs of Police, Inc. and The National District Attorneys Association, Inc., in a

brief in support of the petitioners, "concede that many abuses have occurred, and that a significant number of releases have been the product of some level of coercion..." (AELE Amici Brief 3).

In view of the admitted potential for misues of release-dismissal agreements, and their pernicious foreclosure of the right of access to the courts to vindicate federally guaranteed rights, the only conceivable basis for upholding release-dismissal agreements would be if they served compelling public-policy needs that outweigh the consitutional rights with which they inherently interfere.

Petitioners concede that release-dismissal agreements cannot be justified on the basis of benefit to individual interests such as those of individual complainants, police officers or prosecutors because agreements resolving criminal proceedings must vindicate and

serve the public interest rather than individual interests. (See Pet. Br. 12-13). Rather, petitioners seek to justify release-dismissal agreements by fabricating claimed benefits to the public interest. There is no substance to any of these claims.

A. Any Protection Afforded by Release-Dismissal Agreements Benefits only Private Persons and Serves No Substantial Public Interest.

Foremost among the benefits to the public interest claimed by the petitioners is the protection of local law enforcement officials and private complainants from civil lawsuits arising from their involvement or assistance in the administration of the criminal justice system. (Pet. Br. 13). Release-dismissal agreements, petitioners suggest, serve "the public interest in effective law enforcement, in attracting and motivating dedicated police personnel and in

encouraging victims of crime to report offenses freely and to assist law enforcement officials..." (Pet. Br. 13).

However, petitioners fail to demonstrate how release-dismissal agreements make any such significant contribution to this public interest. It cannot be contended -- and petitioners do not so state -- that upholding some release-dismissal agreements on the basis of criteria that have nothing to do with the conduct of law enforcement officials or private complainants in reporting, and developing evidence for prosecution of, criminal offenses plays any significant role in "attracting and motivating dedicated police personnel and in encouraging victims of crime to report offenses freely and to assist law enforcement officials." When the police and victims of crime develop evidence for prosecution of a possible criminal offense

they have no idea whether the possible offense will be prosecuted; if so, what the outcome will be; if not, whether a release-dismissal agreement will be obtained; if obtained, whether it will be upheld; or if, regardless of anything else, the defendant will seek to file a civil rights action anyway. As the standard proposed by petitioners for upholding a release-dismissal agreement -- that it be "voluntary, deliberate, and informed" (Pet. Br. 35) -- has no relationship to the conduct of the police or the victim in reporting and investigating the alleged crime, such persons cannot shape that conduct in any way by the prospect that a release-dismissal agreement might be obtained and upheld.

With so many imponderables, it is obvious that an after-the-fact release-dismissal agreement that would be upheld as proper under petitioners' standard would

not provide the type of protection on which the beneficiaries could necessarily rely in shaping their conduct. Furthermore, in many cases it may be protection to which they are not fairly entitled. Petitioners' "voluntary, deliberate, and informed" standard for upholding release-dismissal agreements does not address the question whether in any particular case it serves the public interest to protect the particular law enforcement officials from possible civil action for the particular conduct involved.[3]

The legal system has recognized the need for legitimate forms of protection of law enforcement officials and private citizens who become involved in law enforcement efforts and, as petitioners recognize, has provided such protection by means far more direct, relevant, and

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[3]Indeed, there may well be cases where the prosecutor's obligation is not to protect such officials but to prosecute them criminally for their conduct.

effective than occasional after-the-fact release-dismissal agreements. Such protection includes indemnity statutes for law enforcement officials, witness-tampering statutes, various privileges and immunities for individuals who report suspected criminal activity to law enforcement officials, and, most significantly, the "good faith" immunity defense available under 42 U.S.C. §1983. (See Pet. Br. at 13-14).

Petitioners endeavor to discount the value of these protections by asserting "the harsh reality that individuals, governments, and society frequently pay a high price in litigation, regardless of the merit of claims or the eventual outcomes of the cases." (Pet. Br. 14). That, of course, is true of any litigation, whether involving governmental or private litigants. But the legal system has rightly determined that the proper way to

minimize such costs is to do what can be done directly through establishment of appropriate defenses limiting liability and through procedural devices such as summary judgment for early termination of non-meritorious claims. Summary judgment has been used successfully to terminate civil rights cases in defendants' favor without trial, including cases where the determinative issue was probable cause for defendants to prosecute alleged criminal activity. Palhava de Varella-Cid v. Boston Five Cents Savings Bank, 787 F.2d 676 (1st Cir. 1986) (held, on summary judgment, that undisputed facts established probable cause even where the plaintiff had been acquitted of all criminal charges).

The fatal flaw in this policy justification for petitioners' approach to release-dismissal agreements is that the standard for upholding a release-dismissal agreement -- that it be "voluntary,

deliberate, and informed" -- makes no distinction between meritorious and non-meritorious civil rights claims. That standard focuses only on the defendant's state of mind in entering into the release-dismissal agreement and not at all on whether the defendants' civil rights claims are, or may be, meritorious. Indeed, the merit of claims based on alleged violations of important constitutional rights cannot, and should not, be judged by evaluation of the propriety of a release-dismissal agreement. The merit of such important claims should be judged by nothing less than the judicial procedure for litigating such claims provided in section 1983. It is only through such procedures -- and not through ad hoc evaluation of release-dismissal agreements -- that the meritorious civil

rights claims can fairly and legitimately be sorted out from the non-meritorious claims.

Petitioners assert that "municipalities can, and often are, in effect, held hostage by vindictive claimants regardless of the legal merits of their claims." (Pet. Br. 16). But petitioners cite no authorities, no facts, no statistics to support this claim. And they provide no basis for concluding that the approach to release-dismissal agreements which they propose will in fact eliminate whatever cases there may be, if any, in which municipalities are so held "hostage."

Petitioners and the AELE amici curiae complain that governmental entities are bearing increased liability insurance costs, or suffering from unavailability of liability insurance, because of the costs of defending even non-meritorious civil

rights claims. (Pet. Br. 15). But, as the AELE amici curiae's own brief shows, these insurance problems are not the result of increased costs of defending against non-meritorious claims. As the cause of the problem, "insurance companies blame a series of multi-million dollar judgments against other cities..." (AELE Amici Brief 6). Obviously the cause of the liability insurance problem is not the costs of defending against non-meritorious civil rights claims but the payment of large judgments in meritorious claims. It is those costs of meritorious civil rights claims with which petitioners and the AELE amici are, and should be, truly concerned. But it is precisely those costs -- incurred in compensating violations of individuals' constitutional rights -- which no ad hoc evaluation of release-dismissal agreements should be permitted to preclude.

B. Release-Dismissal Agreements Do Not Facilitate the Just Resolution of Criminal Prosecutions.

Next petitioners seek to find a public-policy justification for their approach to release-dismissal agreements by the claim that such agreements provide "both prosecutors and defendants with an effective and practical vehicle for achieving a just resolution of certain cases." (Pet Br. 16.)

Again the tool -- upholding release-dismissal agreements which are voluntary, deliberate, and informed -- has no relationship (except by coincidence) to the specified public interest, "a just resolution of certain cases." Whether the resolution of the particular case is "just" is an entirely different inquiry from whether the release-dismissal agreement was voluntary, deliberate, and informed. Such

an agreement may be all of those things without serving in the slightest to ensure that the resolution of the case is "just."

Exercise of a prosecutor's discretion is controlled by his or her duty to pursue the public interest in justice, without regard for a potential defendant's agreement not to institute a civil action. Accord, Dixon v. District of Columbia, supra at 969; MacDonald v. Musick, supra at 375; Horne v. Pane, supra at 552. The prosecutor may legitimately determine that the prosecution of a particular criminal complaint will not further this public interest for any of the following reasons: (1) if he lacks a good faith belief that the state possesses sufficient evidence to convict, (2) if the case is of low general deterrence value, or (3) if the charge is low on the order of the Government's enforcement priorities, Wayte v. United States, supra at 1531. If the prosecutor

determines on these, or on any other legitimate grounds relating to the case and its role in the criminal justice system, that the interests of justice require a dismissal of the charges, then a threat to prosecute if the potential defendant refuses to execute a release of any civil claims violates the prosecutor's duty to serve the public interest. See Dixon v. District of Columbia, supra at 969; MacDonald v. Musick, supra at 375; Hoines v. Barney's club, Inc., supra at 635-636 (Tobriner, J., dissent); Horne v. Pane, supra at 552. Conversely, it would be a gross dereliction of that duty if a complainant presented a prosecutable case involving a serious criminal offense but the prosecutor declined to prosecute because he was able to obtain a release of civil-rights claims aganst law enforcement

officials who were more concerned about such claims than about the criminal offense.

Contrary to petitioners' claim, the facts of the present case do not in the least demonstrate "the desirability of having a release-dismissal option available to defendants and prosecutors." (Pet. Br. 17). What they demonstrate is that, quite apart from the release-dismissal agreement, there was every reason not to prosecute and the prosecutor would probably have filed a nolle prosequi of the case without the agreement except that "Rumery's lawyer was threatening civil action." (Pet. Br. 19) In response to the allegation by Rumery's lawyer of a violation of Rumery's constitutional rights, the prosecutor then insisted on the release-dismissal agreement to protect the municipality, its police chief and, supposedly, a complainant. Obtaining this agreement somehow, according

to petitioners, "allowed the prosecutor sufficient discretion to arrive at a just resolution of the charges against Rumery while protecting a fragile but vital witness." (Pet. Br. 19)

If entry of nolle prosequi was a "just resolution of the charges against Rumery," however, they should simply have been dropped -- without bringing in the extraneous consideration of protecting anyone against a civil action. Obtaining protection from civil litigation is not a proper part of the prosecutor's function to vindicate public rights through the criminal justice system. This Court should not permit a prosecutor's discretion whether to prosecute to be based on whether a potential criminal defendant agrees to give a release of possible civil claims.

C. Release-Dismissal Agreements Are Not a Proper Tool for Asserting Constitutional Rights.

Petitioners' final try at finding a public-interest justification for the ad hoc approach to release-dismissal agreements is the feeblest of all -- the claim that such agreements benefit persons charged with crime by providing them with an "effective, inexpensive, and accessible mechanism" for enforcing their constitutional rights pursuant to 42 U.S.C. §1983. (Petitioners do, at least acknowledge that, "at first blush, the notion that a waiver of rights can serve as a mechanism for enforcing those rights appears oxymoronic.") (Pet. Br. 20).

Petitioners' suggestion that "Rumery utilized his constitutional rights . . . to create leverage with which he obtained a complete dismissal of the charges against him" (Pet. Br. 20-21) appears to be at odds with petitioners' earlier description of

the prosecutor's decision as "a reasonable exercise of discretion in the public interest" and "a compassionate, humane decision as to the victim." (Pet. Br. 18.) From these conflicting descriptions it is difficult to know what petitioners really claim to have happened. If Rumery did indeed use the threat of a section 1983 civil action to "leverage" a complete dismissal of criminal charges that would not otherwise have been dismissed, such "leverage" exercised in Rumery's private interest was improperly permitted to defeat the public interest in prosecution of a supportable charge of witness tampering.

The key point, however, is that obtaining dismissal of a criminal charge cannot be viewed as an appropriate remedy for victims of civil rights violations. Because release-dismissal agreements accomplish only a criminal dismissal for the victim, they address only a single

consequence of government misconduct -- the improperly brought criminal charge. They deprive the victim of all other compensation for constitutional torts and defeat the deterrent goals of civil remedies. For these reasons, the vindiction of civil rights should be left to the remedy expressly provided by Congress under 42 U.S.C. §1983.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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